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SUPREME COURT
APPENDIX

In the Supreme Court of the United States

October Term, 1971

No. 71-1016

Federal Power Commission, petitioner

v.

Louisiana Power & Light Company, et al.

No. 71-1040

United Gas Pipe Line Company and
Pennsylvania United, Inc., petitioners

v.

Louisiana Power & Light Company

PETITIONS FOR WRITS OF CERTIORARI FILED IN
NO. 71-1016 ON FEBRUARY 7, 1972, AND IN
NO. 71-1040 ON FEBRUARY 14, 1972.

CERTIORARI GRANTED MARCH 6, 1972.

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The Commission Proceedings

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October 26	—Petition for declaratory order filed by United in FPC Docket No. RP71-29
December 10	—Order of Commission granting intervention to LP&L in FPC Docket No. CP71-89
December 21	—Hearings commenced in FPC Docket No. RP71-29
December 29	—Order of Commission approving interim settlement in FPC Docket No. RP71-29
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February 22	—Supplemental petition for declaratory order filed by United in FPC Docket No. RP71-29
April 15	—Issuance of Commission Order No. 431
May 14	—Order of Commission granting intervention to LP&L in FPC Docket No. CP71-89
June 7	—Hearings commenced in FPC Docket No. CP71-89
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December 3	—Opinion No. 606-A of the Commission in FPC Docket No. RP71-29 denying rehearing
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The Court Proceedings

1971	
March 31	—Finding of complaint by LP&L
April 27	—Issuance of temporary restraining order by district court
April 28	—Motion to intervene, and to dismiss the action filed by Commission
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April 30	—Application filed by LP&L in Court of Appeals for leave to file writs of mandamus and certiorari and, alternatively a motion for expedited appeal
May 1	—Order by Judge Wisdom staying judgment of district court and reinstating temporary restraining order
May 14	—Order of Court of Appeals continuing Judge Wisdom's stay and remanding case to district court for hearing on jurisdictional issue
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1972	
January 14	—Decision of Court of Appeals reversing district court and remanding
March 6	—Order of this court granting writ of certiorari to review decision of Court of Appeals

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LOUISIANA POWER & LIGHT COMPANY, plaintiff VS. UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., Defendants	CIVIL ACTION NO. 16,637

COMPLAINT

Now comes Louisiana Power & Light Company (LP&L) and for its complaint against the defendants, United Gas Pipe Line Company (United), and Pennzoil United, Inc. (Pennzoil), respectfully alleges:

THE PARTIES

1. Plaintiff, Louisiana Power & Light Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Florida, and having its principal place of business in the State of Louisiana. LP&L is engaged in the generation, transmission, distribution, and sale of electric power and energy throughout 46 of the 64 Parishes in the State of Louisiana, including Ouachita Parish. LP&L operates electric generating plants known as "Sterlington Station" in the Parish of Ouachita near the community of Sterlington, and as "Nine Mile Point Station" in Jefferson Parish, Louisiana.

2. Defendants, United and Pennzoil, are corporations, duly organized and existing under and by virtue of the laws of the State of Delaware, and having their principal places of business in the State of Texas. United is engaged in the transmission of natural gas through transmission lines located in the States of Mississippi, Louisiana, Texas, and northward and eastward into the mid-west and eastern part of the United States. United has been furnishing natural gas to LP&L at both the Nine Mile Point Station and the Sterlington Station for many years under contract. United is a wholly owned subsidiary of Pennzoil.

JURISDICTION

3. It has become necessary for LP&L to bring this action for an injunction and for damages because of the continuing and anticipated breach of contract in the furnishing of natural gas by United directly, and in coordination with and under the inducement, direction and control of Pennzoil. This Court has jurisdiction under 28 U.S.C. § 1332 because this is a civil action in which the matter in controversy exceeds the sum or value of $10,000 and is between citizens of different states.

THE CONTROVERSY

4. Sterlington Station consists of four electric generating units of varying sizes, the smallest being of a capacity of 32,000 kilowatts and the largest 224,000 kilowatts. When these units were constructed between the years 1928 and 1958, the supply of natural gas in North Louisiana was sufficiently abundant so as to obviate any contemplation of securing an alternate source of fuel other than natural gas. The Nine Mile Point Station consists of four electric generating units of varying sizes, the smallest being of a capacity of 74,000 kilowatts and the largest 750,000 kilowatts. There is no alternate source of fuel at the Nine Mile Point Station except for emergencies of not more than 3 days.

5. LP&L has entered into several contracts with United for the supply of natural gas to the Sterlington Station. Those contracts are as follows:

(a) An Agreement dated February 20, 1956, for a term of 20 years, which contract set a maximum daily delivery obligation of not in excess of 25,000 mcf of gas, and which contract contains no hourly limitations. Copy of which contract is annexed hereto as Exhibit "A". That contract further contains an Article IX, entitled "Impairment of Deliveries", which article reads as follows:

"In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall

first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers."

This said 1956 Agreement was amended on March 29, 1963 and on November 30, 1966, the only amendment relevant to this complaint being the increase in maximum daily delivery obligation from 50,000 mcf up to 55,000 mcf. Then, on December 2, 1969, LP&L and United entered into a further amendment of the 1956 Agreement. The only change wrought by the 1969 amendment relevant to this dispute was the decrease in the maximum daily delivery obligation from 55,000 mcf down to 30,000 mcf during the calendar year 1970. No hourly maximum limitations were stipulated in any of the amendatory agreements of 1963, 1966 and 1969. On August 10, 1970, LP&L agreed to a further amendment setting the daily maximum at 25,000 mcf, effective January 1, 1971.

(b) On December 2, 1969, LP&L and United entered into a Transportation Agreement whereby United agreed to transport for LP&L gas received by United from the Antioch Field for the benefit of LP&L, said gas to be delivered to LP&L at the Sterlington Station through the same meter and intermingled with the gas delivered by United under its 1956 base Agreement with LP&L. The said Transportation Agreement contains no hourly maximum restrictions. Copy of said Agreement is annexed hereto as Exhibit "B".

(c) On May 5, 1967, LP&L and United entered into a "Standby Gas Sales Agreement", which agreement was amended as of December 2, 1969, and which agreement, as amended, provides for no guaranteed deliveries of gas, but for the sale of such gas as United may, in its sole discretion, have available for sale. Copy of said Agreement is annexed hereto as Exhibit "C".

6. LP&L has entered into a contract with United for the supply of natural gas to the Nine Mile Point Station. This contract is as follows:

(a) An Agreement dated May 6, 1968 for a term of 25 years which contract set a maximum daily delivery obligation of not in excess of 80,000 mcf. That contract

further contains an Article IX entitled "Impairment of Deliveries", which article reads as follows:

"Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumer."

A copy of said Agreement is annexed hereto as Exhibit "D".

7. United filed an application with the Federal Power Commission (FPC) on October 26, 1970, proposing a curtailment program for most if not all of its customers for the so-called "winter months", i.e., from November 1, 1970 through March 31, 1971. Those being months when the demands for energy in LP&L's system are at low ebb, LP&L joined with most if not all of United's customers in amicably agreeing upon such curtailment program, the effect of which was nil upon LP&L's system capabilities.

8. However, United has now filed a supplemental application with the FPC by which it proposes a further curtailment program, this proposal covering the so-called "summer months", i.e., from April 1, 1971 to October 31, 1971.

9. This said curtailment program proposal by United to commence on April 1, 1971 will affect LP&L's Sterlington and Nine Mile Point Stations by reason of a reduction in gas supplied by United, all in violation of United's delivery obligations and not in accordance with the contract articles on "Impairment of Delivery" quoted above in paragraphs 5 and 6, and in violation of the provisions of its General Gas Tariff Article 12.1, as amended subsequent to the execution of said contracts.

10. United has further advised LP&L that the said proposed curtailment plan, effective April 1, 1971, will result in the curtailment of deliveries of natural gas to Nine Mile Point from the daily maximum agreed upon in the aforesaid contract of 80,000 mcf to an amount between 66,847 mcf and 35,300 mcf, and at Sterlington from the daily maximum agreed upon of 25,000 mcf to between 24,330 and some lesser amount, the exact amount of said curtailments to depend upon the extent of an alleged shortage in the supply of natural gas in the Pennzoil and United system.

11. The curtailment program proposed by United, as described by United, contemplates the curtailing of industrial users, including gas used to general electricity which in turn is supplied to industrial users; then, after all such customers have been curtailed and if there remains an alleged shortage in the United and Pennzoil system, United contemplates curtailing gas used to general electricity consumed by domestic consumers, and after curtailing all power stations, if there remains an alleged shortage, only then would it curtail gas used domestically. (Said program is set forth and attached as Exhibits "E" and "F".)

12. The curtailment program advanced by United described above is in contradiction and defeat of LP&L's rights under its contracts with United. The article on "Impairment of Deliveries" in the Sterlington contract quoted hereinabove provides that LP&L stands first, along with gas utilities selling gas to domestic consumers, in the event of a shortage of gas. Under the contract, only after the public utility power plants and the gas utilities obtained their full gas requirements would there then be gas supplied by United to the consumers, and that supply would be made ratably.

The Nine Mile Point contract "Impairment of Deliveries" provision quoted hereinabove provides that the order of priority in the event of a shortage calls for the gas utilities to be fully supplied first, then the public utility power plants to be fully supplied second, and if there is not enough gas for all of the power plants, then they are to be supplied ratably. Then, thirdly would come the other consumers, and they would be supplied ratably by United. United's curtailment program constitutes and contemplates a significant change, if indeed not a reversal, of priorities of curtailment. United contemplates curtailing industrial

users first, including gas used to generate electricity which in turn is supplied to industrial users; then, if there were still a shortage, United contemplates curtailing gas used to generate electricity which is consumed by domestic consumers. After that curtailment, if there were still a shortage, only then would United curtail gas used by domestic consumers. Additionally, there is no indication of what curtailment United proposes with respect to its own industrial or commercial consumers, or indeed, with any of its other customers of any kind.

13. United has represented to LP&L that the interruptions and curtailments of delivery of natural gas to Sterlington and Nine Mile Point were necessary and will be necessary in order for United to have on the days of proposed interruption and curtailment sufficient gas to supply the needs of its domestic consumers on such days. LP&L has recently been informed by United that said proposed interruptions and curtailments will not be necessary to supply the needs of domestic consumers on the days of such interruptions and curtailments due to any alleged shortage of natural gas on such days in the United and Pennzoil system, but that such interruptions and curtailments will be for the purpose of filling United's underground storage reserves on such days, and of supplying other of United's large industrial customers, some of whom are new customers who have contracted with United for purchase of gas within the last two or three years when United knew it might be faced with a shortage of natural gas.

14. Such proposed curtailments of deliveries of natural gas by United to the Nine Mile Point and Sterlington power plants of LP&L constitute breaches, as alleged above, of the obligations of United under its gas supply contracts with LP&L described hereinabove, and, unless restrained by this Court, United will breach its obligations under such contracts by the proposed additional curtailment program to be instituted by it on April 1, 1971. Similarly, unless restrained by this Court, United's parent company, Pennzoil, will induce, direct and control such breaches of contract.

NECESSITY FOR INJUNCTIVE RELIEF

15. LP&L will suffer immediate and irreparable damage if United is not restrained from breaching and Pennzoil

restrained from inducing the breach of United's contracts to sell and deliver to LP&L the volumes of natural gas that United agreed to sell and deliver in the contracts referred to hereinabove.

16. LP&L has throughout its system serving 46 of 64 Parishes in Louisiana a total of some 340,000 customers, among whom are numbered some of the largest chemical and petro-chemical plants and oil refining and gas processing installations in the entire United States. The generating and transmission system of LP&L is interconnected with the systems of Central Louisiana Electric Company, Gulf States Utilities Company, Southwestern Electric Power Company, and New Orleans Public Service Inc., being all of the other electric utility companies in the State of Louisiana. LP&L also is the supplier of electricity to nine of the thirteen rural electric cooperatives in Louisiana, which cooperatives furnish electric service to some 105,000 consumers throughout the State of Louisiana. LP&L also furnishes electricity by wholesale contract, and by standby and/or emergency agreements to nine municipalities in Louisiana, said municipalities furnishing electric service to some 139,000 consumers. Further, the system of LP&L is interconnected to the systems of Arkansas Power & Light Company, Mississippi Power & Light Company and Mississippi Power Company, and also participates in an electric transmission grid network known as "South Central Electric Companies" consisting of eleven large electric utility companies in the South Central area of the United States furnishing electricity to consumers on the order of 2,870,000, and which network is further interconnected with a power pool that inter-ties the entire electric system of the United States east of the Rocky Mountains with the exception of part of the State of Texas.

17. The curtailment in the quantity of gas furnished by United during peak periods as described hereinabove to LP&L's Nine Mile Point and Sterlington Stations prevents Louisiana Power & Light Company from utilizing the full generating capability of these power stations, resulting in inability to meet the demands upon said stations, the ultimate effect of which can be a "blackout" or "brownout". In an interconnected transmission grid network such as described above there is an element of interdependence of such nature as exposes the members of such network to a

"domino effect" in the event of a blackout at one of the generating stations. Thus, such a blackout or brownout, depending upon the circumstances at the time, such as weather, peak demands, equipment failures, acts of God, and the like, could extend and expand such blackout to cover an area as large as the whole State of Louisiana or, indeed, a several-State area such as occurred during the notorious "Northeast Blackout" in 1965. A blackout of any magnitude would constitute irreparable injury, and would cause damage to LP&L beyond any means of calculation, but would, if only in the slightest degree, be of a magnitude amounting to millions of dollars.

18. Apart from the irreparable injury that may be suffered by LP&L as described above, if the unwarranted breach of contract by United is permitted, LP&L will suffer, until United is enjoined, a present and continuing kind of irreparable injury. Because of LP&L's reliance upon United honoring its contract to furnish gas to Sterlington, LP&L constructed the Sterlington Station without any provisions for the use of an alternative source of energy, oil or other fossil fuel. There is no alternative source of natural gas available to LP&L for the Sterlington Station to utilize the full capacity of the Sterlington Station. Accordingly, the abovesaid curtailment in the supply of gas by United causes an additional irreparable injury to LP&L through the inability by LP&L to fully utilize the generating capability of the Sterlington Station, the loss of which capability is on the order of 60,000 kilowatts, which loss will continue to be suffered so long as United curtails the supply of gas. This loss is irreparable since electricity is a product which cannot be stored and which can be used only when there is demand therefor, and which must be supplied when the demand exists or not at all, and there is no remedy at law for this loss. Further, this loss is irreparable since it consists of a loss of use of money invested in these facilities which is incalculable, but which is substantial in view of the investment in Sterlington Station being on the order of $30,010,000.00, and at Nine Mile Point Station about $84,000,000.00, and there is no remedy at law for this loss.

PRAYER

Accordingly, LP&L invokes the provisions of 28 U.S.C.

§ 1332 as well as this Court's general equity jurisdiction and respectfully requests that the Court:

(a) Issue its temporary restraining order as provided by Rule 65(b) of the Federal Rules of Civil Procedure restraining and enjoining Pennzoil and United from curtailing the supply of gas to the Sterlington and Nine Mile Point generating stations of LP&L in breach of its contracts with LP&L pending a hearing on LP&L's application for preliminary injunction and ordering said companies to deliver natural gas to LP&L in accordance with the provisions of said contracts;

(b) Issue a preliminary injunction in accordance with Rule 65 of the Federal Rules of Civil Procedure restraining and enjoining United and Pennzoil from curtailing the supply of gas to the Sterlington and Nine Mile Point generating stations of LP&L in breach of its contracts with LP&L pending a hearing on LP&L's application for permanent injunction, and ordering said companies to deliver natural gas to LP&L in accordance with the provisions of said contracts;

(c) Issue its permnaent injunction restraining and enjoining United and Pennzoil from curtailing the supply of gas to the Sterlington and Nine Mile Point generating stations of LP&L in breach of its contract with LP&L, and ordering said companies to deliver natural gas to LP&L in accordance with the provisions of said contracts;

(d) Grant such other and further relief at law or in equity as the Court may deem just and proper.

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VERIFICATION

STATE OF LOUISIANA
PARISH OF ORLEANS

H. L. Deloney, being duly sworn deposes and says that he is a Vice President of Louisiana Power & Light Company, plaintiff herein, and that he has read the foregoing complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

/s/ H. L. Deloney
H. L. Deloney, Vice President

Sworn to and subscribed
before me this 29th day of
March, 1971.

/s/ Eugene G. Taggart
Notary Public

Filed
March 31, 1971

EXHIBIT "A"

THIS AGREEMENT made and entered into this 20th day of February, 1956, by and between UNITED GAS PIPE LINE COMPANY, a Delaware Corporation, hereinafter called "Seller", and LOUISIANA POWER & LIGHT COMPANY, a Florida corporation, hereinafter called "Buyer";

WITNESSETH:

WHEREAS, Buyer is the owner and operator of a power plant consisting of five steam electric generating units located at Sterlington, Louisiana;

WHEREAS, Buyer proposes to construct and operate a sixth steam electric generating unit at said Sterlington, Louisiana, plant site, such unit to be of a nominal rated 200,000 KW output;

WHEREAS, Buyer desires to purchase natural gas from Seller for all the fuel requirements for the operation of Buyer's said proposed Unit No. 6 and Buyer's presently existing Unit No. 5; and

WHEREAS, Seller has a supply of natural gas available for delivery to Buyer and is willing to sell and deliver to Buyer natural gas for such purposes and in the quantities as hereinafter provided;

NOW, THEREFORE, in consideration of the mutual covenants and obligations herein contained and assumed by each party, the parties hereto covenant and agree as follows:

I.

DEFINITIONS

The following terms, when used in this agreement, shall have the following meaning:

1. The term "day" shall mean a period of 24 consecutive hours beginning as nearly as is practicable at 7:00 A.M. or at such other time as may be mutually agreed to by Buyer and Seller.

2. The term "billing month" shall mean the calendar month.

3. The term "cubic foot of gas," for the purpose of measurement of the gas delivered and for all other purposes, unless otherwise specifically provided, is the amount of gas necessary to fill a cubic foot of space when the gas is at an absolute pressure of fourteen and nine-tenths (14.9)

pounds per square inch and at a base temperature of sixty (60) degrees Fahrenheit.

4. The term "Mcf", which is the sales unit hereunder, shall mean one thousand (1,000) cubic feet of gas.

5. The term "Maximum Daily Delivery Obligation" shall mean the maximum volume of gas which Seller is obligated to deliver to Buyer in any one day.

II.

Quality

The gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that Seller may extract or permit the extraction of any of the constituents of said natural gas; provided, that Seller shall not subject said gas nor permit said gas to be subjected to any treatment in the extraction of any of the constituents of said gas which shall substantially change the chemical composition of any of the component parts of said gas. Seller is to tender delivery to Buyer of natural gas which is of merchantable quality only and reasonably free from water and other objectionable liquids, reasonably free from sand and other objectionable solids and which contains not more than forty (40) grains of sulphur or twenty (20) grains of hydrogen sulphide per thousand (1,000) cubic feet.

III.

Measurement

1. Assumed Atmospheric Pressure—The average atmospheric pressure shall be assumed to be fourteen and seven-tenths (14.7) pounds per square inch, irrespective of actual elevation or location of the point of delivery above sea level or variations in such atmospheric pressure from time to time.

2. Orifice Meters—When orifice meters are used for the measurement of gas, the computations of the volumes of gas measured shall be made in accordance with the following subsections (a) to (h), inclusive:

(a) The orifice coefficient for each meter shall be calculated at the base pressure and base temperature set forth in Section 3 of Article I hereof, at a flowing tem-

perature of sixty (60) degrees Fahrenheit and for gas of six hundred thousandths (.600) specific gravity.

(b) The temperature of the gas shall be determined by a recording thermometer so installed that it may record the temperature of the gas flowing through the meter or meters. The average of the record obtained shall be deemed to be the gas temperature for the period under consideration, and the orifice coefficient as calculated in (a) above shall be corrected for each degree variation in the average temperature from sixty (60) degrees Fahrenheit.

(c) The specific gravity of the gas shall be determined by a recording gravitometer so installed that it may record the specific gravity of the gas flowing through the meter or meters; provided, however, if Seller does not consider the installation of such recording gravitometer necessary, Seller shall make spot tests with an Edwards or other standard type specific gravity balance. If the recording gravitometer is used, the average of the record obtained shall be deemed to be the specific gravity of the gas for the period under consideration and the orifice coefficient as calculated in subsection (a) above shall be corrected for each one-thousandth (.001) variation from six hundred thousandths (.600). If the spot test method is used, the specific gravity of the gas delivered hereunder shall be determined once monthly on a day as near the first (1st) of the billing month as is practicable, or as much oftener as is found necessary in practice. The result obtained from the test made on or near the first (1st) of the billing month shall be deemed to be the specific gravity of the gas during that billing month and the orifice coefficient as calculated in subsection (a) above shall be corrected accordingly for each one-thousandth (.001) variation from six hundred thousandths (.600). Any special test which is made shall be applicable from the day made until the next regular test or other special test is made.

(d) Exact measurements of inside diameters of pipe runs and orifices shall be obtained to the nearest one-thousandth (.001) inch, which measurements shall be used in computations of coefficients.

(e) Pressure taps for meter installation shall be taken from pipe runs two and one-half (2½) inside pipe

diameters upstream and eight (8) inside pipe diameters downstream from the orifice.

(f) All orifice meter computations required in this Section 2 shall be made in accordance with formulae and tables contained in Metric Metal Works Bulletin E-2 (Revised 1931). In the computations of the orifice coefficient, the calculation of "X" shall be carried to six (6) decimals and "C" shall be determined to three (3) decimal places by interpolations from tables on Pages 76 and 77 in Metric Metal Works Bulletin E-2 (Revised 1931). The pressure base, flowing temperature and specific gravity factors used shall consist of four (4) significant figures, unless the first digit is "1", in which case five (5) significant figures shall be used.

(g) In determining the volume of gas delivered through the orifice during a period, either the observation method or the orifice chart integrator shall be used in reading the meter chart. The sum of the extensions obtained from the reading or integration of the meter chart shall be multiplied by the orifice coefficient corrected in accordance with sub-sections (b) and (c) above, to obtain the gas volume for that chart.

(h) The volumes of gas as determined in the manner described above shall be adjusted to give effect to the deviation of such gas from Boyle's law, as follows:

(1) There shall be determined the average pressure (gauge) at which the gas was delivered during the period under consideration.

(2) The average temperature for the period under consideration shall be determined as provided in sub-section (b) above.

(3) There shall be selected from the table of multipliers, attached hereto and made a part hereof and identified as "Exhibit A", the multiplier corresponding to the average pressure and the average temperature as determined in (1) and (2) above; provided, however, that if at any time the composition of the gas delivered shall have materially changed so that said multipliers are no longer reasonable, Seller shall substitute appropriate multipliers.

(4) The corrected volume of gas for the period under consideration shall be the result obtained by multiplying

the volume of gas determined in the manner hereinabove set forth by the multiplier selected in (3) above.

3. Positive Meters—When positive meters are used for the measurement of gas, the flowing temperature of the gas delivered shall be assumed to be sixty (60) degrees Fahrenheit, and no correction shall be made for any variation therefrom; provided, however, that Seller shall have the option of installing a recording thermometer and if Seller exercises such option and installs such thermometer, correction shall be made for each degree variation in the average flowing temperature for each positive meter chart.

The volumes of gas determined shall be adjusted to give effect to the deviation of such gas from Boyle's law, as follows:

(a) There shall be determined the average pressure (gauge) at which the gas was metered during the period under consideration.

(b) The average temperature for the period under consideration shall be determined as provided above.

(c) When the flowing temperature of the gas delivered is assumed to be sixty (60) degrees Fahrenheit, there shall be selected from the table of positive meter multipliers, shown in sub-section (e) below, the multiplier corresponding to the average pressure as determined in (a) above; and, when the flowing temperature of the gas delivered be recorded as provided above, the multiplier shall be obtained by squaring the appropriate multiplier selected from the table of said Exhibit "A"; provided, however, that if at any time the composition of the gas delivered shall have materially changed so that said multipliers are no longer reasonable, Seller shall substitute appropriate multipliers.

(d) The corrected volume of gas for the period under consideration shall be the result obtained by multiplying the volume of gas hereinabove determined by the multiplier selected in (c) above.

(e) Boyle's Law Deviation Multipliers for Positive Meters:

AVERAGE PRESSURE PSIG	ASSUMED TEMPERATURE 60° F.
0-49	1.006

50-99	1.016
100-149	1.025
150-199	1.033
200-249	1.042
250-299	1.051
300-349	1.061
350-399	1.070
400-499	1.079
450-499	1.088

4. Determination of Heat Content—The Btu content of the gas delivered, when required to be determined under the provisions of this agreement, shall be determined for a cubic foot of gas at a temperature of sixty (60) degrees Fahrenheit, at an absolute pressure of fourteen and nine-tenths (14.9) pounds per square inch, and at the moisture content of the gas delivered. Such total heating value of the gas delivered shall be determined by Seller, using a Thomas or other standard type calorimeter, either by taking a spot sample or by using a record from a recording calorimeter. The spot sample shall be taken as often as is found necessary in practice, and such sample shall be taken, or the recording calorimeter shall be located at a suitable point on Seller's line so that the heating value of the gas delivered may be obtained. The moisture content of the gas delivered shall be determined at a suitable point by Seller as often as is found necessary in practice.

IV.

Measurement Equipment

1. Ownership and Operation—Seller shall furnish, install, operate and maintain, at its own expense at the point(s) of delivery the meters, instruments and equipment of standard type necessary to measure properly, in accordance with Article III hereof, the gas to be delivered. Seller shall likewise furnish, install, operate and maintain, at its own expense, such instruments and equipment as may be necessary at points other than the point(s) of delivery to obtain the information to measure properly, in accordance with Article III hereof, the gas to be delivered. The metering and other equipment installed, together with any buildings

erected by it for such equipment, shall be and remain the property of Seller.

Whenever facilities of either party, required for or incidental to proper performance under this agreement are located on premises of the other, then to the extent that it may have the right to do so, such party grants to the owner of said facilities, free of charge, the use of the premises so occupied or to be so occupied and the right of free ingress and egress to such premises at all times for the purposes of installation, operation, repair or removal of such facilities.

Either party shall have access to the metering equipment of the other at all reasonable times, but the reading, calibration and adjustment thereof and changing of charts (unless otherwise mutually agreed upon) shall be done only by the employees or agents of the owner thereof. Charts and records from such metering equipment shall remain the property of the owner thereof. Upon request of the other party, the requested party will submit its records and charts from its metering equipment, together with calculations therefrom, for the requesting party's inspection and verification, subject to return within ten (10) days after receipt thereof, after which return they shall be kept on file by the owner thereof for the mutual use of both parties for a period of one (1) year.

2. Buyer's Meters—Buyer may, at its option and expense, install and operate meters, instruments and equipment of standard type at or near any point of delivery to check Seller's meters, instruments and equipment, but the measurement of gas delivered shall be by Seller's meters only, except in cases herein provided to the contrary. The meters, instruments and equipment installed by Buyer shall be subject at all reasonable times to inspection or examination by Seller, but the reading, calibration and adjustment thereof and changing of charts (unless otherwise mutually agreed upon) shall be done by Buyer.

3. Notice of Meter Tests—Each party shall give to the other party notice of the time of all tests of meters sufficiently in advance of the holding of the test so that the other party may conveniently have its representatives present; provided, however, that if either party has given such notice to the other party and the other party is not

present at the time specified, then the party giving the notice may proceed with the test as though the other party were present.

At least once each thirty (30) days, on a day as near the first (1st) of each month as practical, each party shall calibrate its orifice meters and appurtenant instruments, and at least once each ninety (90) days, on a day as near the first (1st) of the month as practical, each party shall calibrate its positive displacement meters, all in the presence of representatives of the other, as hereinabove provided in this Section, and the parties shall jointly observe any adjustment made.

4. Corrector for Errors of Meters—If, upon any test, the percentage of inaccuracy of any metering equipment is found to be in excess of two per cent (2%), registrations thereof shall be corrected for a period extending back to the time such inaccuracy occurred, if such time is ascertainable, and if not ascertainable, then back one-half of the time elapsed since the last date of calibration. If for any reason, meters are out of service or out of repair, so that the amount of gas delivered cannot be ascertained or computed from the readings thereof, the gas delivered during the period such meters are out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter or meters if installed and accurately registering.

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) By estimating the quantity of delivery by deliveries during preceding period under similar conditions when the meters were registering accurately.

V.

Billings and Payments

1. Billing Date—On or before the tenth (10th) of each calendar month, Seller shall render to Buyer, at such office as Buyer may designate, statements showing the calculation of the monthly bill for gas delivered by Seller to Buyer during the preceding billing month.

2. Payment Date—On or before the twentieth (20th) day of each calendar month Buyer shall make payments to Seller, at such office as Seller may designate, of amounts due Seller as shown by statements furnished Buyer in accordance with the foregoing Section 1.
3. Late Payment—In the event Buyer shall fail to pay any amount due Seller when the same is due, then interest thereon shall accrue at the rate of six per cent (6%) per annum from the date when such amount is due until the same is paid. If such failure to pay continues for sixty (60) days, Seller may suspend deliveries of gas, and the exercise of such right shall be in addition to any and all other remedies available to Seller.
4. Error in Bills—In the event an error is discovered in the amount billed in any statement rendered by Seller, such error shall be adjusted promptly.
5. Late Billing—If presentation of a bill to Buyer is delayed after the tenth (10th) day of the month, then the time of payment shall be extended accordingly unless Buyer is responsible for such delay.
6. Access to Billing Data—Buyer and Seller shall have the right to examine the books, records, and charts of the other party at all reasonable times to the extent necessary to verify the accuracy of any statement, charge or computation made pursuant to the provisions of any article of this agreement.

VI.

Possession of Gas

Seller shall be in exclusive control and possession of the gas deliverable and responsible for any damage or injury caused thereby until the same shall have been delivered to Buyer, after which delivery Buyer shall be in exclusive control and possession thereof and responsible for any injury or damage caused thereby.

VII.

Warranty

Seller warrants generally the title to all gas delivered, and agrees to indemnify Buyer from all suits, actions,

debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties or charges thereon.

VIII.

Force Majeure

1. Definition of "Force Majeure"—The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests, and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome; such term shall likewise include, (a) in those instances where either Buyer or Seller is required to obtain servitudes, rights of way grants, permits or licenses to enable such party to fulfill its obligations under this agreement, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost, and after the exercise of reasonable diligence, such servitudes, rights of way grants, permits or licenses and, (b) in those instances where either Buyer or Seller is required to furnish materials and supplies for the purpose of constructing or maintaining facilities or is required to secure permits or permission from any governmental agency to enable such party to fulfill its obligations under this agreement, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost, and after the exercise of reasonable diligence, such materials and supplies, permits and permissions.
2. Limitations on Obligations.—In the event of either Buyer or Seller being rendered unable wholly or in part by force majeure to carry out its obligations under

this agreement, other than to make payments due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch.

3. Strikes and Lockouts—The settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty, and the above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

IX

Impairment of Deliveries

Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers.

X.

Periodic Requirements and Notification of Changes

All gas taken hereunder shall be in equal daily and hourly quantities as nearly as operating conditions will permit.

Buyer and Seller will notify each other from time to time as necessary of expected changes in the rates of daily delivery or takings of gas under this agreement, or in the

pressures or other operating conditions, and the reasons for such expected changes as soon as such reasons come to the knowledge of either Buyer or Seller to the end that the that the other party may be prepared to meet or to take advantage of such expected changes when, as and if they occur.

XI.

Scope and Quantities

Subject to the terms, conditions and limitations hereof, Seller agrees to sell and deliver or cause to be delivered to buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for, natural gas for use in the operation of Buyer's steam electric generating station located near Sterlington, Louisiana, in accordance with the following provisions.

(a) During the period commencing March 26, 1958, and extending to the time that Buyer first places into operation its said proposed new sixth steam electric generating unit, natural gas for all of Buyer's fuel requirements for the operation of its present existing steam electric generating Unit No. 5 up to, but not in excess of 13,000 Mcf of 1,000 Btu per cubic foot gas in any one day, which quantity, unless and until changed as hereinafter provided, shall be the Maximum Daily Delivery Obligation, provided, however, that in the event Buyer should at any time or from time to time require temporary additional daily quantities of gas, over and above the quantities of gas hereinabove provided, for the operation of Buyer's other existing steam electric generating units, Seller shall, to the extent Seller then has excess gas available in its then existing lines over and above the quantities necessary at such time to fulfill Seller's then existing commitments to its other consumers and Seller's requirements for the operation of its facilities, deliver such temporary additional daily quantities of gas to Buyer hereunder.

(b) During the period commencing at the time that Buyer first places into operation its said proposed new steam electric generating unit and continuing thereafter, natural gas for all of Buyer's fuel requirements for the operation of said proposed new Unit No. 6 and said existing Unit No. 5, up to, but not in excess of 50,000 Mcf of

1,000 Btu per cubic foot gas in any one day for said two units, which quantity, unless and until changed as hereinafter provided, shall be the Maximum Daily Delivery Obligation, provided, however, that in the event Buyer should at any time or from time to time require temporary additional daily quantities of gas, over and above the quantities of gas hereinabove provided for, for the operation of Buyer's other existing steam electric generating units, Seller shall, to the extent Seller then has excess gas available in its then existing lines over and above the quantities necessary at such time to fulfill Seller's then existing commitments to its other consumers and Seller's requirements for the operation of its facilities, deliver such temporary additional daily quantities of gas to Buyer hereunder.

If at any time and from time to time during the term hereof, Buyer requires daily quantities of gas in excess of the Maximum Daily Delivery Obligation then in effect, Buyer shall notify Seller in writing, at least twelve (12) months in advance of the daily quantity of gas by which Buyer's requirements will exceed said Maximum Daily Delivery Obligation then in effect, stating in such notice the date on which such increase will occur. Within ninety (90) days after the receipt of such notice, Seller shall elect, and so notify Buyer, whether Seller is agreeable to so increasing said Maximum Daily Delivery Obligation by the amount so requested by Buyer. In the event Seller elects to deliver such additional quantity of gas, the Maximum Daily Delivery Obligation then in effect shall be increased, on the date so specified in said notice, or the first anniversary of the date on which such notice was given, whichever date is the later, by the additional quantity of gas required by Buyer as specified in said notice. In the event Seller does not elect to deliver such additional quantity of gas, Buyer shall thereafter have the right to make other arrangements or agreements for that portion of Buyer's daily requirements which is in excess of the Maximum Daily Delivery Obligation then in effect.

XII.

Delivery Point and Pressure

The gas to be sold and delivered by Seller to Buyer hereunder shall be delivered to Buyer at the outlet side of Seller's metering and regulating station as installed by

Seller on a location mutually agreeable to Seller and Buyer on the site of Buyer's said steam electric generating station at Sterlington, Louisiana.

In the event any of Seller's facilities required to make deliveries of gas to Buyer hereunder are or will be located on the premises of Buyer then, and in such event, Buyer agrees to furnish to Seller, free of charge, the use of the premises so occupied or to be occupied by any of Seller's facilities which may be located on Buyer's premises, with the right of ingress and egress at all times for the purposes of installation, operation, repair and removal of said facilities; such facilities in event of location on Buyer's premises shall be placed at locations mutually agreeable to Buyer and Seller.

The gas to be sold and delivered by Seller to Buyer hereunder shall be delivered at said delivery point at such steady, even pressure as Buyer may designate from time to time; provided, however, that Seller shall never be obligated to maintain a pressure in excess of fifty (50) pounds per square inch gauge.

XIII.

TERM

This agreement shall be for a term commencing on March 26, 1958, at 7:00 A.M. and shall end on April 1, 1978, unless the term of this agreement is altered in accordance with the operation of the provisions of Article XIV and this Article XIII.

It is recognized that, before delivery and receipt of gas for use in said new Unit No. 6 can commence hereunder, Buyer must construct certain facilities, including said steam electric generating unit itself, and Seller must construct certain facilities, including pipe line and other facilities. Buyer agrees that it will proceed with diligence to complete the construction of all its facilities, and further agrees to give Seller at least nine months' prior written notice of the anticipated completion and initial operation of its said Unit No. 6. Seller hereby agrees that it will complete its facilities and be ready to deliver gas for furnace drying and testing purposes at least three months prior to said anticipated completion and initial operation date. In this connection, it is agreed that, if Buyer has not commenced actual construction of its said steam elec-

tric generating unit by January 1, 1957, Seller shall have the right, on and after said January 1, 1957, by written notice to Buyer to immediately terminate this agreement and all the terms and provisions hereof.

XIV

Rates

Subject to the adjustments hereinafter provided, the price to be paid by Buyer to Seller for each Mcf of gas sold and delivered to Buyer hereunder shall be as follows:

(A) For the period commencing on March 26, 1958, and ending on January 1, 1965, the applicable provisions of the following monthly rates set forth in sub-section (a), (b), and (c) shall apply:

(a) MONTHLY RATE

74.5 cents per Mcf when total deliveries are between	0 and 150 Mcf
35.0 cents per Mcf when total deliveries are between	151 and 300 Mcf
32.0 cents per Mcf when total deliveries are between	301 and 1500 Mcf
27.0 cents per Mcf when total deliveries are between	1,501 and 5000 Mcf
25.0 cents per Mcf when total deliveries are between	5,001 and 10000 Mcf
23.0 per Mcf when total deliveries are between	10,000 and 15000 Mcf
20.0 cents per Mcf when total deliveries are between	15,000 and 50000 Mcf
18.0 cents per Mcf when total deliveries are between	50,001 and 150,000 Mcf
17.5 cents per Mcf when total deliveries are between	150,000 Mcf

(b) EXCEPTION

When the quantity of gas delivered by Seller to Buyer during any of the respective months of May, June, July, August and September of any year, exceeds either (i) the Maximum Daily Delivery Obligation then in effect, as set forth in Article XI hereof, times the number of days in the respective billing month; or (ii) the maximum quantity of gas, expressed in Mcf of 1,000 Btu per cubic foot gas, delivered by Seller to

Buyer on any day during the preceding winter period beginning with the month of October and extending through the month of April, times the number of days in the respective billing month, whichever, (i) and (ii), is the greater, then the following rate shall apply to all such excess gas delivered by Seller to Buyer during such respective months of May, June, July, August and September:

14 cents per Mcf for all such gas.

(c) The prices set forth in sub-sections (a) and (b) next above shall be increased or decreased as the case may be by an amount equal to the amount by which the weighted average price payable for all gas purchased by Seller during the monthly period ending on the last day of the second preceding billing month in the Western Region of Seller's system, as outlined on Exhibit "B" attached hereto, exceeds or is less than ten cents; such weighted average price to be expressed in cent per thousand cubic feet at 14.9 pounds per square inch absolute, and otherwise under the conditions of measurement set forth in the various contracts under which Seller purchases such gas; and provided, further, that the maximum amount payable for gas delivered hereunder in any billing month (before making any adjustment for Btu content of such gas) shall never be more than an amount determined by multiplying the maximum volume permitted in the step of the above schedule in which such month's deliveries fall by the price (as adjusted for variation in Seller's cost of gas as above provided) set forth in the step immediately following the step in which the actual total deliveries for such billing month fall. For the purpose of this agreement, the term "weighted average price" shall include, in addition to the cost of the gas itself, all taxes (as hereinafter defined) which may be levied upon and paid by Seller, or which Seller under contractual obligation pays to the party on which such taxes are levied, on or with respect to such gas, prior to the receipt thereof by Seller in its Main Pipe Line System, but shall not include any deductions for compression of such gas and any payments for special service which may be provided for in Seller's gas purchase contracts.

(B) During each of the five-year periods of this agreement, and during the remaining period of this agreement, after the expiration of the period set forth in (A) above, a price determined in the manner hereinafter provided for in this subdivision (B).

At least ninety (90) days prior to the beginning of each such period under consideration Seller shall determine and submit to Buyer for agreements thereto a new monthly rate for the gas deliverable hereunder during the period under consideration. In arriving at such new monthly rate, Seller shall give due consideration to applicable factors and elements of Sellers' estimated costs for the period under consideration, including all costs incident to the acquisition of the gas, transportation costs, cost of additional facilities and other relevant costs and factors, including a reasonable return to Seller, applicable to the determination of rates for gas to be delivered to industrial customers in the rate zone of Seller in which Buyer's plant is located.

Prior to the beginning of said period to which such new monthly rate will apply, Buyer shall notify Seller whether or not it is agreeable to such new monthly rate so determined by Seller. In the event Buyer agrees to such new monthly rate, such rate shall be applicable to all gas delivered hereunder during said period. In the event Buyer does not agree to such new monthly rate, this agreement shall automatically terminate on the date of expiration of the period next preceding the period for which such new monthly rate is applicable.

If this agreement be terminated as provided in the next above paragraph, Buyer shall have the right, in order to give Buyer sufficient time to make any necessary physical changes or other arrangements for its gas requirements, to continue to purchase gas under all of the terms and conditions of this agreement except that the price to be paid for such gas shall be in accordance with said new monthly rate so determined by Seller for the period under consideration and to which monthly rate Buyer did not agree; provided, however, that Buyer shall notify Seller immediately upon the completion of such arrangements for supplying its said requirements, at which time the right granted to Buyer in this paragraph shall terminate and provided, further, that under no conditions shall this right

extend beyond one year from the date this agreement is terminated as hereinabove provided.

Subject to the other provisions hereof, the prices to be paid for gas delivered during each of such periods shall be subject to adjustment for taxes and for variation in the Btu content of the gas as hereinafter provided.

XV.

BTU Adjustment

The price per Mcf for natural gas hereinabove specified in the Monthly Rate is based on gas having a gross heat value of one thousand (1,000) Btu per cubic foot, and shall be adjusted for any variation in the Btu content of such gas as follows:

Should Seller, during any billing month, deliver to Buyer gas containing less or more than one thousand (1,000) Btu per cubic foot, the monthly bill for such gas so delivered during such billing month shall be decreased or increased 0.1% for each Btu below or above an average of one thousand (1,000) Btu per cubic foot, measured in accordance with Article III.

XVI.

Tax Reimbursement

Buyer agrees to reimburse Seller for all taxes which may be levied upon and paid by Seller, or which Seller under contractual or legal obligation pays to the person or company on which such taxes are levied, on or with respect to the gas delivered hereunder; provided, however, that no reimbursement shall be made to Seller under the provisions of this article for any taxes which are included in the weighted average price of gas under the provisions of Article XIV hereof.

The term "taxes" as used herein shall mean any tax (other than ad valorem, income or excess profits taxes), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value, or sales price of the gas in question; provided, however, that the term "taxes" shall not be deemed to include any general franchise tax

imposed on corporations on account of their corporate existence or on their right to do business within the State as a foreign corporation.

XVII.

Contemplated Facilities

Buyer contemplates that it may hereafter construct and operate additional steam electric generating capacity at its Sterlington Plant, or at a new steam electric generating station to be located in North Louisiana. Accordingly, it is hereby agreed that, in the event, prior to January 1, 1970, Buyer (i) constructs and operates additional steam electric generating capacity at Sterlington, or (ii) informs Seller of its decision to construct and operate additional steam electric generating capacity in North Louisiana, Seller and Buyer will supplement and amend the within contract to cover the sale and purchase of gas for the fuel requirements of such additional steam electric generating facilities at Sterlington, or at such new plant located in North Louisiana, up to 50,000 Mcf in any one day, provided that entering into such amendment by Buyer and Seller is conditioned on the following:

(1) Seller and Buyer reaching agreement upon the location of the point of delivery for any such additional daily quantities of gas.

(2) Buyer agreeing to the rates to be paid by Buyer to Seller for any such additional gas which rates shall be those determined by Seller in accordance with later provisions of this article.

Seller and Buyer expressly agree that (a) Buyer will, on or before the commencement of construction of any such new steam electric generating facilities, and in any event, at least 15 months before any such facilities are to be put in operation, give Seller written notice thereof, stating in such notice the definite location of any such new facility, and the daily quantities of gas which Buyer will require for any such additional facility and the date on which deliveries of gas therefor are to commence, and (b) within 90 days from the receipt of such notice from Buyer, Seller shall determine and submit to Buyer for agreement thereto a proposed location for a delivery point for the gas delivered under this contract for such additional facility.

Seller shall also submit to Buyer a rate schedule for the gas to be delivered under this contract for such additional facility during the period covered by such rate schedule. Buyer agrees that, within 30 days from receipt of such proposed location for said delivery point and Seller's rate schedule, it will notify Seller in writing whether or not the proposed delivery point and rate schedule will be agreeable to Buyer. If Buyer agrees to such delivery point and rate schedule, they shall be included in a supplement or amendment to this contract which will be executed by Seller and Buyer.

If Buyer does not, within the aforesaid 30-day period, agree to the proposed delivery point and such rate schedule, the agreement for supplementing and amending the within contract for such purposes shall automatically terminate without prejudice to any of the other provisions of this contract. In the event that the above-mentioned rate schedule submitted by Seller does not cover a period which extends throughout the remainder of the term of this contract and Buyer should agree to such rate schedule, Seller shall, at least 90 days prior to the termination of the period covered by such rate schedule, submit to Buyer a new rate schedule for the gas to be delivered to Buyer's additional facility. Should such new rate schedule not cover a period which extends throughout the remainder of the term of this contract, Seller shall in like manner from time to time throughout the remaining period of this contract submit new rate schedules to Buyer at least 90 days prior to the termination of any rate schedule which is then in effect, it being understood that Buyer shall have a period of 30 days in which to accept or reject any new rate schedule submitted by Seller, and upon Buyer's rejection of any such rate schedule there shall be no further obligation on Seller or Buyer under this contract with respect to delivering or receiving gas for Buyer's said additional facility.

In determining the new rate schedule submitted by Seller to Buyer under the provisions of this Article XVII, Seller shall give due consideration to applicable factors and elements of Seller's estimated costs for the period under consideration, including all costs incident to the acquisition of the gas, transportation costs, cost of additional facilities, and other relevant costs and factors, in-

cluding a reasonable return to Seller, applicable to the determination of rates for gas to be delivered to industrial consumers in the rate zone of Seller in which Buyer's additional facility is located.

XVIII.

DESCRIPTIVE HEADINGS

The descriptive headings of the provisions of this agreement are formulated and used for convenience only and shall not be deemed to affect the meaning or construction of any such provisions.

XIX.

DULY CONSTITUTED AUTHORITIES

This agreement is especially made subject to all present or future valid rules, regulations, or orders of any commission or regulatory body having jurisdiction.

XX.

SUCCESSORS AND ASSIGNS

This agreement shall bind and benefit the successors and assigns of each of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals to be hereunto affixed to two (2) counterparts, each of which shall constitute an original, on the day and year first above written.

WITNESS
(Illegible)
(Illegible)

UNITED GAS PIPE LINE COMPANY
By (Illegible)
Executive Vice President
ATTEST:
(Illegible)
Secretary

WITNESS:
/s/ (Illegible)
(Illegible)

LOUISIANA POWER & LIGHT COMPANY
By (Illegible)
Vice President
ATTEST:
(Illegible)
Secretary

NOTE:
The exhibits A and B attached to the above contract are sent in the original)

THIS AGREEMENT made and entered into this 29th day of March, 1963, by and between UNITED GAS PIPE LINE COMPANY, a Delaware Corporation, hereinafter called "Seller" and LOUISIANA POWER & LIGHT COMPANY, a Florida corporation, hereinafter called "Buyer";

WITNESSETH:

WHEREAS, Seller and Buyer entered into an agreement dated February 20, 1956, covering the sale and purchase of natural gas for use in the operation of Units 5 and 6 of Buyer's steam electric generating station located near Sterlington, Ouachita Parish, Louisiana;

WHEREAS, the above mentioned agreement provides a monthly rate for all gas delivered prior to January 1, 1965;

WHEREAS, Seller and Buyer have agreed to a new rate to be effective for the period prior to January 1, 1970;

WHEREAS, Seller and Buyer desire to amend the above mentioned agreement to incorporate such new rate for the period specified.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter contained, the parties hereto do mutually agree as follows:

1.

Effective on the first day of the month following the date of execution hereof, Article XIV, RATES, shall be changed and amended so that said Article XIV shall thereafter, in its entirety, read as follows:

"XIV"

"RATES"

"(A) During the period ending at 7:00 a.m. on January 1, 1970, the price to be paid by Buyer to Seller for each one million (1,000,000) Btu of gas sold and delivered hereunder shall be twenty-two cents (22 cents).

"The total number of Btu delivered by Seller to Buyer during each billing month shall be determined by multiplying the total volume of gas in Mcf delivered by Seller to

Buyer during each billing month by the average Btu content of the volumes of gas delivered by Seller to Buyer during the billing month in question.

"(B) During the five-year period after the expiration of the period set forth in (A) above, and during the remaining period of this agreement, a price determined in the manner hereinafter provided for in this subdivision (B).

"At least ninety (90) days prior to the beginning of each such period under consideration Seller shall determine and submit in writing to Buyer for agreement thereto a new monthly rate for the gas deliverable hereunder during the period under consideration. In arriving at such new monthly rate, Seller shall give due consideration to applicable factors and elements of Seller's estimated costs for the period under consideration, including all costs incident to the acquisition of the gas, transportation costs, cost of additional facilities and other relevant costs and factors, including a reasonable return to Seller, applicable to the determination of rates for gas to be delivered to industrial customers in the rate zone of Seller in which Buyer's plant is located.

"Prior to the beginning of said period to which such new monthly rate will apply, Buyer shall notify Seller whether or not it is agreeable to such new monthly rate so determined by Seller. In the event Buyer agrees to such new monthly rate, such rate shall be applicable to all gas delivered hereunder during said period. In the event Buyer does not agree to such new monthly rate, this agreement shall automatically terminate on the date of expiration of the period next preceding the period for which such new monthly rate is applicable.

"If this agreement be terminated as provided in the next above paragraph, Buyer shall have the right in order to give Buyer sufficient time to make any necessary physical changes or other arrangements for its gas requirements, to continue to purchase gas under all of the terms and conditions of this agreement except that the price to be paid for such gas shall be in accordance with said new monthly rate so determined by Seller for the period under consideration and to which monthly rate Buyer did not agree; provided, however, that Buyer shall notify Seller immediately upon the completion of such arrangements for

supplying its said requirements, at which time the right granted to Buyer in this paragraph shall terminate and provided, further, that under no conditions shall this right extend beyond one year from the date this agreement is terminated as hereinabove provided.

"(C) It is recognized that Buyer owns and operates additional units in the plant covered hereunder as well as additional power plants, the fuel requirements of which may or may not be supplied by Seller. It is further recognized that Buyer may from time to time install one or more additional power plants or units on its system, and the fuel requirements for such plants or units may or may not be supplied by Seller. It is also recognized that Buyer may have inter-company interchange contracts with affiliated companies, under which agreements Buyer may exchange electricity with such companies and may purchase electricity from or sell electricity to such companies and that such arrangements may from time to time be amended, renewed or extended. It is also recognized that Buyer may from time to time exchange, buy from and sell electricity to other electric generating companies, agencies, or associations.

"Buyer agrees, notwithstanding the receipt by Buyer of quantities of electricity from, or the delivery by Buyer of quantities of electricity to, said parties under said arrangements relating to the sale, exchange or purchase of electricity and/or as a result of the generation of electricity at stations and/or in units (including units at the Sterlington Plant not covered hereunder) not served by Buyer under the provisions of this agreement, to purchase from Seller during the calendar year beginning on January 1, 1963, and ending on December 31, 1963, and during each calendar year thereafter a quantity of gas equal to at least sixty-five per cent (65%) of the maximum quantity of gas purchased by Buyer from Seller during the calendar year ending December 31, 1961"

2.

Effective on the first day of the month following the date of execution hereof, Article XV, BTU ADJUSTMENT, shall be deleted in its entirety and of no further force and effect whatsoever.

3.

Effective on the first day of the month following the date of execution hereof, Article XVI, TAX REIMBURSEMENT, of the above mentioned agreement shall be changed and amended so that said Article shall thereafter, in its entirety, read as follows:

"XVI"

"TAX REIMBURSEMENT"

"Buyer agrees to reimburse Seller for all taxes which may be levied upon and paid by Seller or which Seller under contractual or legal obligation pays to or for the person or company on which such taxes are levied, on or with respect to the gas delivered hereunder; provided, however, that no reimbursement shall be made to Seller under the provisions of this article for such specific taxes as were in effect on January 1, 1963, up to the respective rates thereof on said date which seller was then paying directly or indirectly.

"The term 'taxes' as used herein shall mean any tax (other than ad valorem, income or excess profits taxes), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sales price of the gas in question; provided, however, that the term 'taxes' shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the State as a foreign corporation."

4.

Except as herein changed and amended the above mentioned agreement of February 20, 1956, shall remain in full force and effect as written.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals to be hereunto affixed in two (2) counterparts, each of which shall constitute an original, on the day and year first above written.

LOUISIANA POWER & LIGHT COMPANY
By: /s/ (Illegible)
Vice President

ATTEST:
/s/ (illegible)
Secretary

UNITED GAS PIPE LINE COMPANY
By: /s/ (Illegible)
Executive Vice President

ATTEST:
/s/ B. M. Byrd
B. M. Byrd Secretary

THIS AGREEMENT made and entered into this 30th day of November, 1966, by and between UNITED GAS PIPE LINE COMPANY, a Delaware corporation, hereinafter called "Seller", and LOUISIANA POWER & LIGHT COMPANY, a Florida corporation, hereinafter called "Buyer";

WITNESSETH:

WHEREAS, Seller is presently selling and delivering natural gas to Buyer for use in the operation of Units 5 and 6 of Buyer's steam electric generating station located near Sterlington, Ouachita Parish, Louisiana, under the terms and conditions of that certain agreement between Seller and Buyer dated February 20, 1956, as amended; and

WHEREAS, Seller and Buyer desire to amend the above mentioned agreement with respect to the quantities of gas which Seller is obligated to deliver to Buyer thereunder.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter contained, the parties hereto do mutually agree as follows:

1.

From and after the effective date of this Amendatory Agreement Article XI of the above mentioned agreement of February 20, 1956, as amended, shall be changed and amended so that said Article XI shall in its entirety, thereafter read as follows:

"XI

"SCOPE AND QUANTITIES

"Subject to the term, conditions and limitations hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive from

Seller and pay Seller for, natural gas for all of Buyer's fuel requirements for the operation of its presently existing Unit No. 5 and Unit No. 6, up to, but not in excess of 55,000 Mcf of 1,009 Btu per cubic foot gas in any one day for said two units, which quantity, unless and until changed as hereinafter provided, shall be the Maximum Daily Delivery Obligation, provided, however, that in the event Buyer should at any time or from time to time require temporary additional daily quantities of gas, over and above the quantities of gas hereinabove provided for, for the operation of Buyer's other existing steam electric generating units, Seller shall, to the extent Seller then has excess gas available in its then existing lines over and above the quantities necessary at such time to fulfill Seller's then existing commitments to its other consumers and Seller's requirements for the operation of its facilities, deliver such temporary additional daily quantities of gas to Buyer hereunder.

"If at any time and from time to time during the term hereof, Buyer requires daily quantities of gas in excess of the Maximum Daily Delivery Obligation then in effect, Buyer shall notify Seller in writing, at least twelve (12) months in advance of the daily quantity of gas by which Buyer's requirements will exceed said Maximum Daily Delivery Obligation then in effect, stating in such notice the date on which such increase will occur. Within ninety (90) days after the receipt of such notice, Seller shall elect, and so notify Buyer, whether Seller is agreeable to so increasing said Maximum Daily Delivery Obligation by the amount so requested by Buyer. In the event Seller elects to deliver such additional quantity of gas, the Maximum Daily Delivery Obligation then in effect shall be increased, on the date so specified in said notice, or the first anniversary of the date on which such notice was given, whichever date is the later, by the additional quantity of gas required by Buyer as specified in said notice. In the event Seller does not elect to deliver such additional quantity of gas, Buyer shall thereafter have the right to make other arrangements or agreements for the portion of Buyer's daily requirements which is in excess of the Maximum Daily Delivery Obligation then in effect."

2.

It is recognized that Seller will be required to obtain

regulatory approval before Seller may increase its obligation to deliver quantities of gas in excess of those provided for in Seller's existing Certificate of Public Convenience and Necessity issued by the Federal Power Commission in Docket No. G-13,002. Therefore, this Amendatory Agreement shall become effective upon the date Seller obtains the required regulatory approval. It is agreed that Seller, in filing and pursuing its application for permission to deliver to Buyer the additional quantities of gas herein contemplated, shall have the right to pursue such application and any supplements and amendments thereto in any manner as Seller deems to be in its best interest, and to that end Seller shall be under no obligation to take any further action whatsoever or it may withdraw its application or file whatever pleadings and motions (including motions for dismissal) as Seller deems desirable. In the event Seller does not obtain such permission upon terms and conditions acceptable to Seller or should Seller withdraw its application or file a motion for dismissal thereof, this Amendatory Agreement shall be of no further force or effect whatsoever.

3.

Except as herein specifically changed and amended the above mentioned agreement of February 20, 1956, as amended, shall remain in full force and effect as written.

In witness whereof, the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals to be hereunto affixed in two (2) counterparts, each of which shall constitute an original, on the day and year first above written.

WITNESSES:
/s/ B. Porter

UNITED GAS PIPE LINE COMPANY
By /s/ (Illegible)
Exec. Vice President

ATTEST:
(Illegible)

/s/ (Illegible)

LOUISIANA POWER & LIGHT COMPANY
By (Illegible)
Vice President

ATTEST:
(Illegible)
Secretary

EXHIBIT "B"

THIS AGREEMENT made and entered into this 2nd day of December, 1969, by and between LOUISIANA POWER & LIGHT COMPANY, a Florida corporation, hereinafter called "Louisiana", and UNITED GAS PIPE LINE COMPANY, a Delaware corporation, hereinafter called "United";

WITNESSETH:

WHEREAS, Louisiana is the owner and operator of a steam electric generating station located at Sterlington, Louisiana;

WHEREAS, Louisiana is presently purchasing all of its natural gas requirements from United;

WHEREAS, Louisiana has advised United that it has purchased a supply of gas in the Antioch Field, Claiborne Parish, Louisiana, from Pan American Petroleum Corporation;

WHEREAS, Louisiana desires United to transport such gas from a point in Claiborne Parish, Louisiana to Louisiana's steam electric generating station at Sterlington, Louisiana; and

WHEREAS, United is willing to transport such gas on the terms and in the quantities hereinafter specifically set forth.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and obligations herein contained, the parties hereto covenant and agree as follows:

1.

DEFINITIONS

1.1 The following terms, when used in this agreement shall have the following meaning:

a. The term "year" shall mean each calendar year within the term of this agreement.

b. The term "day" shall mean a period of 24 consecutive hours beginning as nearly as is practicable at 7:00 a.m. or at such other time as may be mutually agreed to by Louisiana and United.

c. The term "billing month" shall mean a calendar month.

d. The term "cubic foot of gas", for the purpose of measurement of the gas delivered and for all other purposes, unless otherwise specifically provided, is the amount of gas necessary to fill a cubic foot of space when the gas is at an absolute pressure of fourteen and seventy-three hundredths (14.73) pounds per square inch and at a temperature of sixty (60) degrees Fahrenheit.

e. The term "Mcf" shall mean one thousand (1,000) cubic feet of gas.

f. The term "Btu" shall mean British thermal unit or units.

g. The term "Transport Gas" shall mean such gas, and only such gas, as Louisiana has purchased from Pan American Petroleum Corporation in the Antioch Field, Claiborne Parish, Louisiana, and will be delivered by Lousisana to United for transportation by United to Louisiana's said steam electric generating station at Sterlington, Louisiana.

2.

SCOPE AND QUANTITY

2.1 Subject to the terms and conditions hereinafter set forth, United agrees to accept and receive for transportation from Louisiana at the hereinafter described delivery point in Claiborne Parish, Louisiana, such gas as Louisiana may have available under its contract with Pan American Petroleum Corporation for delivery to United for transportation from time to time from the Antioch Field and which daily quantities of gas United in its sole discretion will accept for transportation. It is estimated that the average quantities of gas Louisiana may have available will approximate 10,000 Mcf of gas daily. It is agreed, however, that United will, to the extent that Louisiana has such gas available from Pan American Petroleum Corporation in the Antioch Field, receive from and re-deliver to Louisiana a minimum annual volume of 2,500,000 Mcf of gas. It is further agreed that, subject to the other terms and conditions of this agreement, if in any one calendar year Louisiana does not have 2,500,000 Mcf of gas available from Pan American Petroleum Corporation in the Antioch Field for transport, Louisiana will nevertheless

pay United a minimum annual Transportation fee of $25,000.

2.2 United agrees to deliver to Louisiana at the redelivery point on Louisiana's plant site on a monthly basis, subject to reasonable dispatching variations, gas containing total quantities of Btu equal to the total quantities of Btu delivered by Louisiana to United for transportation in accordance with the provisions hereof.

2.3 United agrees that it will accept for transportation from Louisiana each month, varying daily quantities of gas and at the end of such month on arithmetical daily average shall be determined by dividing the total deliveries by Louisiana during such month by the number of days in the succeeding month. In determining what proportion of the gas delivered by United to Louisiana each day shall be Sales Gas and that which shall be Transport Gas, it is agreed that the Transport Gas redelivered by United to Louisiana on each day in any month shall, for the purpose of billing and accounting, be an amount equal to the arithmetical average as determined above and shall be the first gas delivered by United to Louisiana each day.

2.4 It is understood that the Transport Gas delivered to United hereunder will be commingled in United's pipe line with United's own gas or with gas of other parties being transported by United; and it is agreed that the gas which United will redeliver to Lousisana will consist of such commingled gas. Further, it being immaterial (except to the extent provided below with respect to Btu content) to Louisiana from what source United obtains the gas which is delivered to Louisiana at its steam electric generating station, Louisiana hereby agrees that such gas deliverable to Louisiana can be gas from any other source in lieu of all or any part of the Transport Gas delivered by Louisiana to United.

2.5 The Transport Gas to be delivered by Louisiana to United shall have a total heating value of not less than one thousand (1,000) British Thermal Units per cubic foot. The gas to be redelivered hereunder by United to Louisiana shall have approximately the same total heating value of Btu per cubic foot as the gas which is delivered hereunder by Louisiana to United with reasonable variations due to such gas being commingled with other gas in United's lines. It is recognized that United is selling certain quan-

tities of gas to Louisiana under the terms of a Sales Agreement dated February 20, 1956, as amended, and the parties hereto agree that the daily volumes delivered by Louisiana to United and redelivered by United to Louisiana at Sterlington, Louisiana, shall be deducted from the aggregate deliveries of sales gas and transport gas and the remainder shall be sales gas. It is further recognized that deliveries at the point of redelivery will be converted to Btu.

2.6 The total heating value of the gas redelivered by United to Louisiana and Transport Gas delivered by Louisiana to United shall be determined for a cubic foot of gas at a temperature of sixty (60) degrees Fahrenheit at an absolute pressure of fourteen and seventy-three hundredths (14.73) pounds per square inch and at the moisture content of the gas delivered. The degree of saturation by water vapor of the gas delivered shall be determined by United by such methods as may be mutually agreed upon and shall be properly taken into account in determining the total heating value of the gas delivered.

3.

DELIVERY POINTS AND PRESSURES

3.1 The Transport Gas delivered by Louisiana to United hereunder shall be delivered at a mutually agreeable point on United's 20" Sarepta-Sterlington Main Line in Claiborne Parish.

3.2 The Transport Gas delivered by Louisiana to United hereunder shall be delivered at pressures sufficient to enter United's line against the maximum operating pressure of such line at said point of delivery provided that the maximum operating pressure at the point of delivery shall not exceed 500 pounds per square inch gauge.

3.3 The Transport Gas redelivered by United to Louisiana hereunder shall be redelivered at the outlet side of United's existing measuring station at Louisiana's steam electric generating station near Sterlington, Louisiana, through which station United is presently selling gas to Louisiana under the terms and conditions of the contract dated February 20, 1956, as amended.

3.4 The Transport Gas to be redelivered by United to Louisiana hereunder shall be delivered at said delivery

point at such steady, even pressure as Louisiana may designate from time to time; provided, however, that United shall never be obligated to maintain a pressure in excess of fifty (50) pounds per square inch gauge.

3.5 Louisiana will provide the premises to be occupied by the measuring station to be installed by Louisiana as provided in Article 6 hereof and agrees to furnish to United the right of ingress and egress at all times for the purpose of operating any such facilities thereon.

3.6 As between the parties hereto, each will indemnify and hold the other harmless on account of injury to person or damages to property incidental to the handling of the gas while in its possession.

4.

QUALITY

4.1 The Transport Gas delivered by Louisiana to United hereunder and all gas redelivered by United to Louisiana hereunder shall be natural gas as produced in its natural state from the wells except that the parties may extract or permit the extraction of any of the constituents of said natural gas; provided that neither party shall subject said gas nor permit said gas to be subjected to any treatment in the extraction of any of the constituents of said gas which shall substantially change the chemical composition of any of the component parts of the gas. Each party is to tender delivery to the other of natural gas which is of merchantable quality only and reasonably free from water and other objectionable liquids and reasonably free from sand and other objectionable solids and which contains not more than forty (40) grains of sulphur, twenty (20) grains of hydrogen sulphide per thousand (1,000) cubic feet. It is expressly agreed that all Transport Gas delivered by Louisiana into United's line shall not have a water content which is in excess of seven (7) pounds of water per million cubic feet and shall contain a minimum of one thousand (1,000) Btu per cubic foot.

5.

MEASUREMENT

5.1 Assumed Atmospheric Pressure—The average atmospheric pressure shall be assumed to be fourteen and seven-

tenths (14.7) pounds per square inch, irrespective of actual elevation or location of the point of delivery above sea level or variations in such atmospheric pressure from time to time.

5.2 Orifice Meters—Orifice meters shall be used for the measurement of gas and the computations of the volumes of gas measured shall be made in accordance with the following sub-sections (a) to (h) inclusive:

(a) The orifice coefficient for each meter shall be calculated at the base pressure and base temperature set forth in Section d. of Article 1. hereof, at a flowing temperature of sixty (60) degrees Fahrenheit and for gas of six-hundred-thousandths (.600) specific gravity.

(b) The temperature of the gas shall be determined by a recording thermometer so installed that it may record the temperature of the gas flowing through the meter or meters. The average of the record obtained shall be deemed to be the gas temperature for the period under consideration, and the orifice coefficient as calculated in (a) above shall be corrected for each degree variation in the average temperature from sixty (60) degrees Fahrenheit.

(c) The specific gravity of the gas shall be determined by a recording gravitometer so installed that it may record the specific gravity of the gas flowing through the meter or meters; provided, however, if Seller does not consider the installation of such recording gravitometer necessary, United shall make spot tests with an Edwards or other standard type specific gravity balance. If the recording gravitometer is used, the average of the record obtained shall be deemed to be the specific gravity of the gas for the period under consideration and the orifice coefficient as calculated in sub-section (a) above shall be corrected for each one-thousandth (.001) variation from six hundred thousandths (.006). If the spot test method is used, the specific gravity of the gas delivered hereunder shall be determined once monthly on a day as near the first (1st) of the billing month as is practicable, or as much oftener as is found necessary in practice. The result obtained from the test made on or near the first (1st) of the billing month shall be deemed to be the specific gravity of the gas during that billing month and the orifice coefficient as calculated in subsection (a) above shall be corrected accordingly for each one-thousandth (.001) variation from six hundred

thousandths (.600). Any special test which is made shall be applicable from the day made until the next regular test or other special test is made.

(d) Exact measurements of inside diameters of pipe runs and orifices shall be obtained to the nearest one-thousandth (.001) inch, which measurements shall be used in computations of coefficients.

(e) Pressure taps for meter installation shall be taken from pipe runs two and one-half (2½) inside pipe diameters upstream and eight (8) inside pipe diameters downstream from the orifice.

(f) All orifice meter computations required in this Article 5. shall be made in accordance with formulae and tables contained in Metric Metal Works Bulletin E-2 (Revised 1931). In the computations of the orifice coefficient, the calculation of "X" shall be carried to six (6) decimals and "G" shall be determined to three (3) decimal places by interpolations from tables on Pages 76 and 77 in Meric Metal Works Bulletin E-2 (Revised 1931). The pressure base, flowing temperature and specific gravity factors used shall consist of four (4) significant figures; unless the first digit is "1", in which case five (5) significant figures shall be used.

(g) In determining the volume of gas delivered through the orifice during a period, either the observation method or the orifice chart integrator shall be used in reading the meter chart. The sum of the extensions obtained from the reading or integration of the meter chart shall be multiplied by the orifice coefficients, corrected in accordance with subsections (b) and (c) above, to obtain the gas volume for that chart.

(h) The volumes of gas as determined in the manner described above shall be adjusted to give effect to the deviation of such gas from Boyle's Law, as follows:

(1) There shall be determined the average pressure (gauge) at which the gas was metered during the period under consideration.

(2) The average temperature for the period under consideration shall be determined as provided in subsection (b) above.

(3) There shall be selected from the table of multipliers, attached hereto and made a part hereof and identified as Exhibit "A," the multiplier correspond-

ing to the average pressure and the average temperature as determined in (1) and (2) above; provided, however, that if at any time the composition of the gas delivered shall have materially changed so that said multipliers are no longer reasonable, United shall substitute appropriate multipliers.

(4) The corrected volume of gas for the period under consideration shall be the result obtained by multiplying the volume of gas determined in the manner hereinabove set forth by the multiplier selected in (3) above.

5.3 The Btu content of the Transport gas and of the gas redelivered shall be determined for a cubic foot of gas at a temperature of sixty (60) degrees Fahrenheit, at an absolute pressure of fourteen and seventy-three hundredths (14.73) pounds per square inch, and at the moisture content of the gas delivered. Such total heating value of the gas delivered shall be determined by United using a Thomas or other standard type calorimeter, or a calculated Btu from gas analysis, by taking a spot sample, by using a continuous Btu sample accumulator, or by using a record from a recording calorimeter. The spot sample shall be taken as often as is found necessary in practice, and such sample shall be taken, or the continuous Btu sample accumulator, or the recording calorimeter shall be located at suitable points on United's line so that the heating value of the gas delivered may be obtained. The moisture content of the gas delivered shall be determined at a suitable point by United as often as is found necessary in practice.

6.

MEASUREMENT EQUIPMENT

6.1 Ownership and Operation—Louisiana shall furnish and install to United's specifications and United will operate and maintain, at its own expense at the point of delivery, the meters, instruments and equipment of standard type necessary to measure properly, in accordance with Article 5 hereof, the gas to be transported. The metering and other equipment installed, together with any buildings erected by it for such equipment, shall be and remain the property of Louisiana.

Either party shall have access to the metering equipment

of the other at all reasonable times, but the reading, calibration and adjustment thereof and changing of charts (unless otherwise mutually agreed upon) shall be done only by the employees or agents of United. Charts and records from such metering equipment shall remain the property of the owner thereof. Upon request of the other party, the requested party will submit its records and charts from its metering equipment, together with calculations therefrom, for the requesting party's inspection and verification, subject to return within ten (10) days after receipt thereof, after which return they shall be kept on file by the owner thereof for the mutual use of both parties for a period of one (1) year.

6.2 Notice of Meter Tests—United shall give to Louisiana notice of the time of all tests of meters sufficiently in advance of the holding of the tests so that Louisiana may conveniently have its representatives present; provided, however, that if United has given such notice to Louisiana and Louisiana is not present at the time specified, then United may proceed with the test as though Louisiana were present.

United shall keep its and Louisiana's measuring equipment accurate and in repair, making such tests as United may deem necessary, all in the presence of representatives of Louisiana, as hereinabove provided in this article, and the parties shall jointly observe any adjustments which are made to the meters.

6.3 Correction for Errors of Meters—If, upon any test, the percentage of inaccuracy of any metering equipment is found to be in excess of two per cent (2%), registrations thereof shall be corrected for a period extending back to the time such inaccuracy occurred, if such time is ascertainable, and if not ascertainable, then back one-half of the time elapsed since the last date of calibration. If for any reason meters are out of service or out of repair, so that the amount of gas delivered cannot be ascertained or computed from the readings thereof, the gas delivered during the period such meters are out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By correcting the error if the percentage of error

is ascertainable by calibration, test or mathematical calculation.

(b) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meters were registering accurately.

7.

BILLINGS AND PAYMENTS

7.1 Billing Date—On or before the tenth (10th) day of each calendar month United shall render to Louisiana, at such office as Louisiana may designate, statements showing the calculation of the monthly bill for gas transported by United for Louisiana during the preceding billing month.

7.2 Payment Date—On or before the twentieth (20th) day of each calendar month Louisiana shall make payments to United, at such office as United may designate, of amounts due United as shown by statements furnished Louisiana in accordance with the foregoing paragraph.

7.3 Late Payment—In the event Louisiana shall fail to pay any amount due United when the same is due, then interest thereon shall accrue at the rate of eight per cent (8%) per annum from the date when such amount is due until the same is paid. If such failure to pay continues for sixty (60) days, United may suspend transportation of gas, and the exercise of such right shall be in addition to any and all other remedies available to United.

7.4 Error in Bills—In the event an error is discovered in the amount billed in any statement rendered by United, such error shall be adjusted promptly.

7.5 Late Billing—If presentation of a bill to Louisiana is delayed after the tenth (10th) day of the month, then the time of payment shall be extended accordingly unless Louisiana is responsible for such delay.

7.6 Access to Billing Data—Louisiana and United shall have the right to examine the books, records and charts of the other party at all reasonable times to the extent necessary to verify the accuracy of any statement, charge or computation made pursuant to the provisions of any article of this agreement.

8.

WARRANTY

8.1 Both parties warrant generally the title to all gas delivered, and agree to indemnify each other from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties or charges thereon.

9.

FORCE MAJEURE

9.1 Definition of "Force Majeure"—The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for making repairs, tests or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome; such term shall likewise include (a) in those instances where either Louisiana or United is required to obtain servitudes, rights of way grants, permits or licenses to enable such party to fulfill its obligations under this agreement, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost, and after the exercise of reasonable diligence, such servitudes, rights of way grants, permits or licenses and (b) in those instances where either Louisiana or United is required to furnish materials and supplies for the purpose of constructing or maintaining facilities or is required to secure permits or permissions from any governmental agency to enable such party to fulfill its obligations under this agreement, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such materials and supplies, permits and permissions.

9.2 Limitations on Obligations—In the event of either Louisiana or United being rendered unable wholly or in part by force majeure to carry out its obligations under this agreement, other than to make payments due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch.

9.3 Strikes and Lockouts—The settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty, and the above requirements that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

10.

TERM

10.1 This agreement shall be for a term commencing on the date of execution hereof and ending on January 1, 1975.

10.2 The terms and conditions of this agreement shall become operatively effective upon the first date of deliveries of Transport Gas hereunder which date shall be as soon as practicable after the installation of any facilities necessary by either party and both parties are ready to receive and deliver gas hereunder and further subject to the provisions of Article 15.

11.

RATE

11.1 Subject to the conditions of subparagraph 2.1 of Article 2 hereof, the price to be paid by Louisiana to United for all gas delivered to United for transportation hereunder shall be one cent (1 cent) per Mcf of such gas.

12.

TAX REIMBURSEMENT

12.1 Louisiana agrees to reimburse United for all taxes which may be levied upon and paid by United, or which United under contractual or legal obligation pays to the person or company on which such taxes are levied, on or with respect to the gas transported hereunder.

12.2 The term "taxes" as used herein shall mean any tax (other than ad valorem, income or excess profits taxes), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself, or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sales price of the gas in question; provided, however, that the term "taxes" shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the State as a foreign corporation.

13.

NOTIFICATIONS

13.1 Any notice hereunder shall be deemed to be fully given if in writing either sent by postpaid registered or certified mail addressed to the respective parties at the addresses stated below or such other address as they shall, respectively, hereafter designate in writing, or if personally delivered to any officer of the respective parties at said respective addresses:

SELLER: United Gas Pipe Line Company
P. O. Box 1407
Shreveport, Louisiana 71102

BUYER: Louisiana Power & Light Company
142 Delaronde Street
New Orleans, Louisiana 70114

14.

GOVERNMENTAL REGULATORY BODIES

14.1 This agreement is subject to all valid orders, rules and regulations of any State or Federal governmental regulatory body having jurisdiction.

15.

REGULATORY REQUIREMENT

15.1 United and Louisiana agree to proceed with reasonable diligence with the filing and prosecution of applications for such governmental authorizations as may be respectively required of them for the construction of the facilities which each may be required to construct under the provisions hereof and for the transportation of gas hereunder. Each party reserves the right to pursue its applications in such manner as it deems to be in its best interest, including the right to file whatever pleadings and motions it deems desirable. Neither party shall be obligated to accept any authorization which contains, in the opinion of the party receiving such authorization, unreasonable or onerous terms and conditions. In the event that United and Louisiana have not by June 1, 1970, obtained such authorizations upon terms and conditions which are not unreasonable or onerous to the party receiving such authorization, then United or Louisiana shall have the right at any time thereafter, but prior to the parties having been issued such authorizations, to cancel this agreement by giving the other party written notice of such cancellation. Upon such cancellation both parties shall be relieved of any liability hereunder.

16.

DESCRIPTIVE HEADINGS

16.1 The descriptive headings of this agreement are formulated and used for convenience only and shall not be deemed to affect the meaning or construction of any such provisions.

17.

SUCCESSORS AND ASSIGNS

17.1 This agreeement shall bind and benefit the successors and assigns of each of the parties hereto.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals to be hereunto affixed in two (2)

counterparts, each of which shall constitute an original, on the day and year hereinabove written.

(Signatures are illegible)

EXHIBIT "C"

STANDBY GAS SALES AGREEMENT

THIS AGREEMENT made and entered into this ..... day of ....., 1967, by and between UNITED GAS PIPE LINE COMPANY a Delaware corporation, hereinafter called "Seller," and LOUISIANA POWER & LIGHT COMPANY, a Florida corporation, hereinafter called "Buyer";

WITNESSETH:

WHEREAS, Buyer is the owner and operator of a power plant consisting of six steam electric generating units located at Sterlington, Louisiana;

WHEREAS, Seller is delivering natural gas to Buyer under the terms and conditions of that certain Gas Sales Agreement dated February 20, 1956, as amended from time to time, principally for the operation of Buyer's No. 5 and No. 6 Units in quantities up to 55,000 Mcf of 1,000 Btu per cubic foot gas in any one day;

WHEREAS, Buyer desires to purchase natural gas from Seller in excess of the quantities covered by the above mentioned agreement for the principal purpose of operating Buyer's Units 3 and 4 on a standby or peaking basis;

WHEREAS, Seller has a supply of natural gas available for delivery to Buyer and is willing to sell and deliver to Buyer natural gas for the standby or peaking operations of Buyer's units.

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto mutually agree as follows:

I.

DEFINITIONS

The following terms, when used in this agreement, shall have the following meaning:

1. The term "day" shall mean a period of 24 consecutive

hours beginning as nearly as is practicable at 7:00 a.m. or at such other time as may be mutually agreed to by Buyer and Seller.

2. The term "billing month" shall mean the calendar month.

3. The term "cubic foot of gas," for the purpose of measurement of the gas delivered and for all other purposes, unless otherwise specifically provided, is the amount of gas necessary to fill a cubic foot of space when the gas is at an absolute pressure of fourteen and nine-tenths (14.9) pounds per square inch and at a base temperature of sixty (60) degrees Fahrenheit.

4. The term "Mcf" shall mean one thousand (1,000) cubic feet of gas.

5. The term "Maximum Daily Delivery Obligation" shall mean the maximum volume of gas deliverable by Seller to Buyer hereunder in any one day.

6. The term "Btu" shall mean British Thermal Unit or Units.

II.

QUALITY

The gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that Seller may extract or permit the extraction of any of the constituents of said natural gas; provided that Seller shall not subject said gas nor permit said gas to be subjected to any treatment in the extraction of any of the constituents of said gas which shall substantially change the chemical composition of any of the component parts of said gas. Seller is to tender delivery to Buyer of natural gas which is of merchantable quality only and reasonably free from water and other objectionable liquids, reasonably free from sand and other objectionable solids and which contains not more than forty (40) grains of sulphur or twenty (20) grains of hydrogen sulphide per thousand (1,000) cubic feet.

III.

MEASUREMENT

1. Assumed Atmospheric Pressure—The average atmospheric pressure shall be assumed to be fourteen and

seven-tenths (14.7) pounds per square inch, irrespective of actual elevation or locations of the point of delivery above sea level or variations in such atmospheric pressure from time to time.

2. Orifice Meters—When orifice meters are used for the measurement of gas, the computations of the volumes of gas measured shall be made in accordance with the following sub-sections (a) to (h) inclusive:

(a) The orifice coefficient for each meter shall be calculated at the base pressure and base temperature set forth in Section 3 of Article I hereof, at a flowing temperature of sixty (60) degrees Fahrenheit and for gas of six hundred thousandths (.600) specific gravity.

(b) The temperature of the gas shall be determined by a recording thermometer so installed that it may record the temperature of the gas flowing through the meter or meters. The average of the record obtained shall be deemed to be the gas temperature for the period under consideration, and the orifice coefficient as calculated in (a) above shall be corrected for each degree variation in the average temperature from sixty (60) degrees Fahrenheit.

(c) The specific gravity of the gas shall be determined by a recording gravitometer so installed that it may record the specific gravity of the gas flowing through the meter or meters; provided, however, if Seller does not consider the installation of such recording gravitometer necessary, Seller shall make spot tests with an Edwards or other standard type specific gravity balance. If the recording gravitometer is used, the average of the record obtained shall be deemed to be the specific gravity of the gas for the period under consideration and the orifice coefficient as calculated in sub-section (a) above shall be corrected for each one-thousandth (.001) variation from six hundred thousandths (.600). If the spot test method is used, the specific gravity of the gas delivered hereunder shall be determined once monthly on a day as near the first (1st) of the billing month as is practicable, or as much oftener as is found necessary in practice. The result obtained from the test made on or near the first (1st) of the billing month shall be deemed to be the specific gravity of the gas during that billing month and the orifice coefficient as calculated in sub-section (a) above shall be corrected accordingly for each one-thousandth (.001) variation from

six hundred thousandths (.600). Any special test which is made shall be applicable from the day made until the next regular test or other special test is made.

(d) Exact measurements of inside diameters of pipe runs and orifices shall be obtained to the nearest one-thousandth (.001) inch, which measurements shall be used in computations of coefficients.

(e) Pressure taps for meter installations shall be taken from pipe runs two and one-half (2½) inside pipe diameters upstream and eight (8) inside pipe diameters downstream from the orifice.

(f) All orifice meter computations required in this Section 2 shall be made in accordance with formulae and tables contained in Metric Metal Works Bulletin E-2 (Revised 1931). In the computations of the orifice coefficient, the calculation of "X" shall be carried to six (6) decimals and "C" shall be determined to three (3) decimal places by interpolations from tables on Pages 76 and 77 in Metric Metal Works Bulletin E-2 (Revised 1931). The pressure base, flowing temperature and specific gravity factors used shall consist of four (4) significant figures, unless the first digit is "1," in which case five (5) significant figures shall be used.

(g) In determining the volume of gas delivered through the orifice during a period, either the observation method or the orifice chart integrator shall be used in reading the meter chart. The sum of the extensions obtained from the reading or integration of the meter chart shall be multiplied by the orifice coefficients, corrected in accordance with sub-sections (b) and (c) above, to obtain the gas volume for that chart.

(h) The volume of gas as determined in the manner described above shall be adjusted to give effect to the deviation of such gas from Boyle's law, as follows:

(1) There shall be determined the average pressure (gauge) at which the gas was metered during the period under consideration.

(2) The average temperature for the period under consideration shall be determined as provided in sub-section (b) above.

(3) There shall be selected from the table of multipliers, attached hereto and made a part hereof and identified as "Exhibit A", the multiplier corresponding to the average

pressure and the average temperature as determined in (1) and (2) above, provided, however, that if at any time the composition of the gas delivered shall have materially changed so that said multipliers are no longer reasonable, Seller shall substitute appropriate multipliers.

(4) The corrected volume of gas for the period under consideration shall be the result obtained by multiplying the volume of gas determined in the manner hereinabove set forth by the multiplier selected in (3) above.

3. Positive Meters—When positive meters are used for the measurement of gas, the flowing temperature of the gas metered shall be assumed to be sixty (60) degrees Fahrenheit, and no correction shall be made for any variation therefrom; provided, however, that Seller shall have the option of installing a recording thermometer, and if Seller exercises such option and installs such thermometer, correction shall be made for each degree variation in the average flowing temperature for each positive meter chart.

The volumes of gas determined shall be adjusted to give effect to the deviation of such gas from Boyle's law, as follows:

(a) There shall be determined the average pressure (gauge) at which the gas was metered during the period under consideration.

(b) The average temperature for the period under consideration shall be determined as provided above.

(c) When the flowing temperature of the gas metered is assumed to be sixty (60) degrees Fahrenheit, there shall be selected from the table of positive meter multipliers, shown in sub-section (e) below, the multiplier corresponding to the average pressure as determined in (a) above; and, when the flowing temperature of the gas metered be recorded as provided above, the multiplier shall be obtained by squaring the appropriate multiplier selected from the table of said Exhibit "A"; provided, however, that if at any time the composition of the gas delivered shall have materially changed so that said multipliers are no longer reasonable, Seller shall substitute appropriate multiplier.

(d) The corrected volume of gas for the period under consideration shall be the result obtained by multiplying the volume of gas hereinabove determined by the multiplier selected in (c) above.

(e) Boyle's Law Deviation Multipliers for Positive Meters:

AVERAGE PRESSURE PSIG	ASSUMED TEMPERATURE 60° F.
0-49	1.006
50-99	1.016
100-149	1.025
150-199	1.033
200-249	1.042
250-299	1.051
300-349	1.061
350-399	1.070
400-449	1.079
450-499	1.088

4. Determination of Heat Content—The Btu content of the gas delivered, when required to be determined under the provisions of this agreement, shall be determined for a cubic foot of gas at a temperature of sixty (60) degrees Fahrenheit, at an absolute pressure of fourteen and nine-tenths (14.9) pounds per square inch, and at the moisture content of the gas delivered. Such total heating value of the gas delivered shall be determined by Seller, using a Thomas or other standard type calorimeter, either by taking a spot sample or by using a record from a recording calorimeter. The spot sample shall be taken as often as is found necessary in practice, and such sample shall be taken, or the recording calorimeter shall be located at a suitable point on Seller's line so that the heating value of the gas delivered may be obtained. The moisture content of the gas delivered shall be determined at a suitable point by Seller as often as is found necessary in practice.

IV.

Measurement Equipment

1. Ownership and Operation—Seller shall furnish, install, operate and maintain, at its own expense at the point(s) of delivery, the meters, instruments and equipment of standard type necessary to measure properly, in accordance with Article III hereof, the gas to be delivered. Seller shall likewise furnish, install, operate and maintain, at its own ex-

pense, such instruments and equipment as may be necessary at points other than the point(s) of delivery to obtain the information to measure properly, in accordance with Article III hereof, the gas to be delivered. The metering and other equipment installed, together with any buildings erected by it for such equipment, shall be and remain the property of Seller.

Either party shall have access to the metering equipment of the other at all reasonable times, but the reading, calibration and adjustment thereof and changing of charts (unless otherwise mutually agreed upon) shall be done only by the employees or agents of the owner thereof. Charts and records from such metering equipment shall remain the property of the owner thereof. Upon request of the other party, the requested party will submit its records and charts from its metering equipment, together with calculations therefrom, for the requesting party's inspection and verification, subject to return within ten (10) days after receipt thereof, after which return they shall be kept on file by the owner thereof for the mutual use of both parties for a period of one (1) year.

2. Buyer's Meters—Buyer may, at its option and expense, install and operate meters, instruments and equipment of standard type at or near any point of delivery to check Seller's meters, instruments and equipment, but the measurement of gas delivered shall be by Seller's meters only, except in cases herein provided to the contrary. The meters, instruments and equipment installed by Buyer shall be subject at all reasonable times to inspection or examination by Seller, but the reading, calibration and adjustment thereof and changing of charts (unless otherwise mutually agreed upon) shall be done by Buyer.

3. Notice of Meter Tests—Each party shall give to the other party notice of the time of all tests of meters sufficiently in advance of the holding of the test so that the other party may conveniently have its representatives present; provided, however, that if either party has given such notice to the other party and the other party is not present at the time specified, then the party giving the notice may proceed with the test as though the other party were present.

At least once each thirty (30) days, on a day as near the first (1st) of each month as practical, each party shall cali-

brate its orifice meters and appurtenant instruments, and at least once each ninety (90) days, on a day as near the first (1st) of the month as practical, each party shall calibrate the positive displacement meters, all in the presence of representatives of the other, as hereinabove provided in this Section, and the parties shall jointly observe any adjustment made.

4. Correction for Errors of Meters—If, upon any test, the percentage of inaccuracy of any metering equipment is found to be in excess of two percent (2%), registrations thereof shall be corrected for a period extending back to the time such inaccuracy occurred, if such time is ascertainable, and if not ascertainable, then back one-half of the time elapsed since the last date of calibration. If for any reason meters are out of service or out of repair, so that the amount of gas delivered cannot be ascerained or computed from the readings thereof, the gas delivered during the period such meters are out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter or meters if installed and accurately registering.

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meters were registering accurately.

V.

Billings and Payments

1. Billing Date—On or before the tenth (10th) day of each calendar month Seller shall render to Buyer, at such office as Buyer may designate, statements showing the calculation of the monthly bill for gas delivered by Seller to Buyer during the preceding billing month.

2. Payment Date—On or before the twentieth day of each calendar month Buyer shall make payments to Seller, at such office as Seller may designate, of amounts due Seller

as shown by statements furnished by Buyer in accordance with the foregoing Section 1.

3. Late Payment—In the event Buyer shall fail to pay any amount due Seller when the same is due, then interest thereon shall accrue at the rate of six percent (6%) per annum from the date when such amount is due until the same is paid. If such failure to pay continues for sixty (60) days, Seller may suspend deliveries of gas, and the exercise of such right shall be in addition to any and all other remedies available to Seller.

4. Error in Bills—In the event an eror is discovered in the amount billed in any statement rendered by Seller, such error shall be adjusted promptly.

5. Late Billing—If presentation of a bill to Buyer is delayed after the tenth (10th) day of the month, then the time of payment shall be extended accordingly unless Buyer is responsible for such delay.

6. Access to Billing Data—Buyer and Seller shall have the right to examine the books, records and charts of the other party at all reasonable times to the extent necessary to verify the accuracy of any statement, charge or computation made pursuant to the provisions of any article of this agreement.

VI.

Possession of Gas

Seller shall be in exclusive control and possession of the gas deliverable and responsible for any damage or injury caused thereby until the same shall have been delivered to Buyer, after which delivery Buyer shall be in exclusive control and possession thereof and responsible for any injury or damage caused thereby.

VII.

Warranty

Seller warrants generally the title to all gas delivered, and agrees to indemnify Buyer from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties or charges thereon.

VIII.

Force Majeure

1. Definition of "Force Majeure"—The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome; such term shall likewise include (a) in those instances where either Buyer or Seller is required to obtain servitudes, rights of way grants, permits or licenses to enable such party to fulfill its obligations under this agreement, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost, and after the exercise of reasonable diligence, such servitudes, rights of way grants, permits or licenses and (b) in those instances where either Buyer or Seller is required to furnish materials and supplies for the purpose of constructing or maintaining facilities or is required to secure permits or permission from any governmental agency to enable such party to fulfill its obligations under this agreement, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such materials and supplies, permits and permissions.

2. Limitations on Obligations—In the event of either Buyer or Seller being rendered unable wholly or in part by force majeure to carry out its obligations under this agreement, other than to make payments due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by force majeure, shall be

suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch.

3. Strikes and Lockouts—The settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty, and the above requirements that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

IX.

Impairment of Deliveries

Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers.

X.

Periodic Requirements and Notification of Changes

All gas taken hereunder shall be taken in equal daily and hourly quantities as nearly as operating conditions will permit.

Buyer and Seller will notify each other from time to time as necessary of expected changes in the rates of daily delivery or takings of gas under this agreement, or in the pressures or other operating conditions, and the reasons for such expected changes as soon as such reasons come to the knowledge of either Buyer or Seller to the end that the other

party may be prepared to meet or to take advantage of such expected changes when, as and if they occur.

XI.

Scope and Quantities

Subject to the terms, conditions and limitations hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for, natural gas for use in the operation of Buyer's steam electric generating station located near Sterlington, Louisiana, in such quantities as Buyer may require from time to time which are in excess of 55,000 Mcf of 1,000 Btu per cubic foot gas on any day provided, however, that Seller shall not be obligated to deliver to Buyer hereunder on any day more than 16,000 Mcf of 1,000 Btu per cubic foot gas.

It is recognized that Seller will deliver gas to Buyer through the same metering and regulating station that Seller delivers gas to Buyer under the above mentioned agreement of February 20, 1956, as amended, under which agreement Seller is limited to 55,000 Mcf of 1,000 Btu per cubic foot gas on any one day. Further, there is no obligation on Buyer to take any gas hereunder on any day unless the fuel requirements of Buyer's Sterlington plant should exceed 55,000 Mcf of 1,000 Btu per cubic foot gas on such day. It is accordingly agreed that the quantities of gas delivered hereunder on any one day during any period that this agreement and said agreement of February 20, 1956, as amended, are simultaneously effective shall be determined by subtracting fifty-five billion (55,000,000,000) Btu from the total number of Btu delivered by Seller to Buyer at Buyer's Sterlington, Louisiana electric generating station on such day. In the event this agreement is effective for any period that the above mentioned agreement of February 20, 1956, as amended, is not effective, then all gas delivered through the delivery point herein provided for shall be gas delivered under this agreement.

XII.

Delivery Point and Pressure

The gas to be sold and delivered to Buyer hereunder shall be delivered to Buyer at the outlet side of Seller's metering

and regulating station as installed by Seller on the site of Buyer's said steam electric generating station at Sterlington, Louisiana, and through which Seller is presently delivering gas to Buyer under the terms of the above mentioned Gas Sales Agreement dated February 20, 1956, as amended.

Buyer agrees to furnish to Seller, free of charge, the use of the premises occupied or to be occupied by any of Seller's facilities which may be located on Buyer's premises, with the right of ingress and egress at all times for the purposes of installation, operation, repair and removal of said facilities; such facilities located on Buyer's premises shall be placed at locations mutually agreeable to Buyer and Seller.

The gas to be sold and delivered to Buyer hereunder shall be delivered at said delivery point at such steady, even pressure as Buyer may designate from time to time; provided, however, that Seller shall never be obligated to maintain a pressure in excess of fifty (50) pounds per square inch gauge.

XIII.

Term

This agreement shall become effective upon the date of execution hereof and extend to January 1, 1972, at 7:00 a.m., it being understood that deliveries of gas hereunder will not commence until such time as Seller has secured the necessary regulatory authority to commence such deliveries of gas hereunder.

XIV.

Rates

The price to be paid by Buyer to Seller for each one million (1,000,000) Btu of gas sold and delivered hereunder shall be thirty-five cents (35 cents).

The total number of Btu delivered by Seller to Buyer during each billing month shall be determined by multiplying the total volume of gas in Mcf delivered by Seller to Buyer during each billing month by the average Btu content of the volumes of gas delivered by Seller to Buyer during the billing month in question.

XV.

Tax Reimbursement

Buyer agrees to reimburse Seller for all taxes which may be levied upon and paid by Seller or which Seller under contractual or legal obligation pays to or for the person or company on which such taxes are levied on or with respect to the gas delivered hereunder; provided, however, that no reimbursement shall be made to Seller under the provisions of this article for such specific taxes as were in effect on January 1, 1963, up to the respective rates thereof on said date which Seller was then paying directly or indirectly.

The term "taxes" as used herein shall mean any tax (other than ad valorem, income or excess profits taxes), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sales price of the gas in question; provided, however, that the term "taxes" shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the State as a foreign corporation.

XVI.

Duly Constituted Authorities

This agreement is especially made subject to all present or future valid, rules, regulations or orders of any commission or regulatory body having jurisdiction.

XVII.

Descriptive Headings

The descriptive headings of the provisions of this agreement are formulated and used for convenience only and shall not be deemed to affect the meaning or construction of any provisions.

XVIII.

Regulatory Requirement

It is recognized that before Seller may make deliveries of gas hereunder, Seller must apply to the Federal Power

Commission for a Certificate of Public Convenience and Necessity, authorizing the delivery of natural gas to Buyer hereunder. It is expressly agreed that Seller in filing and pursuing its said application for a Certificate of Public Convenience and Necessity authorizing Seller to deliver gas hereunder shall have the right to pursue such application in any manner as Seller deems to be in its best interest and to that end Seller shall be under no obligation to take any further action whatsoever after filing such application, and it may withdraw its application or file whatever pleadings and motions (including motions for dismissal) as Seller deems desirable. In the event Seller does not obtain such certificate upon terms and conditions acceptable to Seller, or should Seller withdraw its application for such certificate or file a motion for dismissal thereof, this agreement shall no longer be of any force or effect whatsoever.

XIX.

Successors and Assigns

This contract shall be binding upon and inure to the benefit of the respective heirs, representatives, successors and assigns of the parties hereto.

If all or any part of Buyer's plant, facilities, and/or other property, into which the gas sold hereunder is received and/or utilized, are voluntarily sold or exchanged by Buyer, then and in such event, Buyer agrees that it will cause the person, firm or corporation so acquiring such property to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement, and Buyer further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

If all or any part of Seller's pipe line system through which the gas sold hereunder is delivered to Buyer is voluntarily sold or exchanged by Seller and Seller will thereby be rendered unable to supply to Buyer any gas which it is obligated to supply hereunder, then, and in such event, Seller agrees that it will cause the person, firm or corporation so acquiring such property to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created

by this agreement applicable to the property so sold or exchanged, and Seller further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals to be hereunto affixed in two (2) counterparts, each of which shall constitute an original on the day and year first above written.

(Signatures hereto omitted)

* * * * *

THIS AGREEMENT made and entered into this 2nd day of December, 1969, by and between UNITED GAS PIPE LINE COMPANY, a Delaware corporation, hereinafter called "Seller" and LOUISIANA POWER & LIGHT COMPANY, a Florida corporation, hereinafter called "Buyer":

WITNESSETH:

WHEREAS, reference is made to the existing Standby Gas Sales Agreement between Buyer and Seller dated May 5, 1967, providing for the deliveries of certain quantities of gas by Seller to Buyer for standby or peaking purposes at Buyer's steam electric generating station located at Sterlington, Louisiana; and

WHEREAS, Buyer and Seller desire to amend said above mentioned Standby Gas Sales Agreement as specifically hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter contained, the parties hereto do mutually agree as follows:

1.

From and after the effective date hereof said above mentioned agreement of May 5, 1967, shall be changed and amended so that the words and figures "fourteen and nine-tenths (14.9)" wherever they appear in said contract shall be changed to read "fourteen and seventy-three hundredths (14.73)".

From and after the effective date hereof Article XI, entitled "Scope and Quantities", shall be changed and

amended so that said Article shall thereafter, in its entirety, read as follows:

"XI.

"SCOPE AND QUANTITIES

"Subject to the terms, conditions and limitations hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for, natural gas for use in the operation of Buyer's steam electric generating station located near Sterlington, Louisiana, in such quantities as Buyer may require from time to time and which Seller, at its sole discretion, may then have available for sale and delivery to Buyer.

"It is recognized that any gas that Seller may deliver to Buyer hereunder will be delivered to Buyer through the same metering and regulation station through which Seller presently delivers gas to Buyer under the existing agreement between Buyer and Seller dated February 20, 1956, as amended. It is further recognized that as of even date herewith, Seller and Buyer hereunder have entered into an agreement which provides for the transportation of gas by Seller for Buyer in quantities and under the other terms and conditions therein set forth. Accordingly, it is agreed that any quantities of gas delivered hereunder on any one day shall be determined by subtracting the total of, (a) 30,000,000,000 Btu during the year 1970, and 25,000,000,000 Btu during the years 1971 through 1974, inclusive, plus (b), the quantity of gas designated as Transport Gas, if any, (converted to Btu) for such day from, (c) the total number of Btu delivered by Seller to Buyer at Buyer's Sterlington, Louisiana, steam electric generating station on such day."

3.

From and after the effective date hereof Article XIII, entitled "Term", of the above mentioned contract of May 5, 1967, shall be changed and amended so that the date January 1, 1972", appearing therein shall thereafter read "January 1, 1975."

From and after the effective date hereof Article XIV, entitled "Rate", of the above mentioned contract of May 5, 1967, shall be changed and amended so that the words and figures "thirty-five cents (35 cents)", appearing therein shall thereafter read "forty cents (40 cents)."

5.

This agreement is especially made subject to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction.

6.

This Amendatory Agreement shall become effective on the date of execution hereof, however, the provisions hereof shall not become operationally effective until 7:00 a.m. on January 1, 1970.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals to be hereunto affixed in two (2) counterparts, each of which shall constitute an original, on the day and year first above written.

(Signatures Illegible)

* * * * *

THIS AGREEMENT made and entered into this 2nd day of December, 1969, by and between UNITED GAS PIPE LINE COMPANY, a Delaware Corporation, hereinafter called "Seller" and LOUISIANA POWER & LIGHT COMPANY, a Florida corporation, hereinafter called "Buyer";

WITNESSETH:

WHEREAS, Seller is presently selling and delivering natural gas to Buyer for use in the operation of Buyer's steam electric generating station located near Sterlington, Ouachita Parish, Louisiana, under the terms and conditions of that certain agreement dated February 20, 1956, as amended;

WHEREAS, the above mentioned agreement, as amended, provides for a new monthly rate to be effective for the five year period beginning January 1, 1970;

WHEREAS, Seller and Buyer have agreed to a new rate for the five year period beginning January 1, 1970; and

WHEREAS, Seller and Buyer desire to amend the above mentioned agreement as heretofore amended with respect to the price to be paid by Buyer to Seller for the five year period beginning January 1, 1970, and with respect to the quantities of gas which Seller is obligated to deliver to Buyer thereunder and to recognize Buyer's other sources of supply through transportation arrangements with Seller and/or others.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter contained, the parties hereto do mutually agree as follows:

1.

From and after the effective dates of this Amendatory Agreement, Article XI of the above mentioned agreement of February 20, 1956, as hereto amended, shall be changed and amended so that Article XI shall in its entirety, thereafter read as follows:

"XI

"SCOPE AND QUANTITIES

"Subject to the terms, conditions and limitations hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer and Buyer agrees to purchase and receive from Seller and pay Seller for natural gas in quantities herein provided, for a portion of Buyer's fuel requirements for the operation of its steam electric generating station, up to, but not in excess of 30,000 Mcf of gas in any one day during the calendar year 1970 and 25,000 Mcf of gas during any one day during the calendar years 1971 through 1974, inclusive. The Billing Demand for the purposes of Article XIV hereof shall be 30,000 Mcf during the calendar year 1970, and 25,000 Mcf during the calendar years 1971 through 1974, inclusive.

"It is recognized that as of even date herewith Seller and Buyer are entering into an agreement under which Seller will transport for Buyer certain quantities of gas to Buyer's said above mentioned steam electric generating station, which transported gas will be delivered by Seller to Buyer through existing delivery facilities of Seller as now located

at Buyer's steam electric generating station located near Sterlington, Louisiana. Seller agrees that it will accept for transportation from Buyer each month, varying daily quantities of gas and at the end of such month an arithmetical daily average shall be determined by dividing the total deliveries by Buyer during such month by the number of days in the succeeding month. In determining what proportion of the gas delivered by Seller to Buyer each day shall be Sales Gas and that which shall be Transport Gas, it is agreed that the Transport Gas redelivered by Seller to Buyer on each day in any month shall, for the purpose of billing and accounting, be an amount equal to the arithmetical average as determined above and shall be the first gas delivered by Seller to Buyer each day."

2.

From and after the effective date of this Amendatory Agreement, the above mentioned agreement of February 20, 1956, as amended shall be further changed and amended so that the words and figures "fourteen and nine-tenths (14.9)" wherever they appear in said contract shall be changed to thereafter read "fourteen and seventy-three hundredths (14.73)".

3.

From and after the effective date of this Amendatory Agreement, Article XIV of the above mentioned agreement of February 20, 1956, as amended, shall be further changed and amended, so that said Article XIV shall thereafter, in its entirety, read as follows:

XIV

"RATES

"A. During the period beginning at 7:00 A.M. on January 1, 1970, and extending to 7:00 A.M. on January 1, 1975, the price to be paid by Buyer to Seller shall consist of a demand charge and a commodity charge as follows:

(a) Demand Charge
Per Mcf of Billing Demand $1.85—per month

(b) Commodity Charge
Per each million Btu contained in the natural gas delivered--21.75 cents, provided, however, during

each subsequent annual period following the period January 1, 1970, to January 1, 1971, the commodity charge shall be increased .50 cents above the price for the next preceding annual period.

"The total number of Btu delivered by Seller to Buyer hereunder during each billing month shall be determined by multiplying the total volume of gas in Mcf delivered by Seller to Buyer during each billing month by the average Btu content of the volumes of gas delivered by Seller to Buyer during the billing month in question, less the volumes of gas transported by Seller for Buyer converted to Btu.

"B. During the remaining period after the expiration of the period set forth in (A) above, a price determined in the manner hereinafter provided for in this subdivision (B).

"At least ninety (90) days prior to the beginning of such remaining period Seller shall determine and submit in writing to Buyer for agreement thereto a new monthly rate for the gas deliverable hereunder during the period under consideration.

"Prior to the beginning of said period to which such new monthly rate will apply, Buyer shall notify Seller whether or not it is agreeable to such new monthly rate so determined by Seller. In the event Buyer agrees to such new monthly rate, such rate shall be applicable to all gas delivered hereunder during said period. In the event Buyer does not agree to such new monthly rate, this agreement shall automatically terminate on the date of expiration of the period next preceding the period for which such new monthly rate is applicable.

"If this agreement be terminated as provided in the next above paragraph, Buyer shall have the right, in order to give Buyer sufficient time to make any necessary physical changes or other arrangements for its gas requirements, to continue to purchase gas under all of the terms and conditions of this agreement except that the price to be paid for such gas shall be in accordance with said new monthly rate so determined by Seller for the period under consideration and to which monthly rate Buyer did not agree; provided, however, that Buyer shall notify Seller immediately upon the completion of such arrangements for supplying its said requirements, at which time the right granted to Buyer in this paragraph shall terminate and provided, further, that

under no conditions shall this right extend beyond one year from the date this agreement is terminated as hereinabove provided."

4.

From and after the effective date of this Amendatory Agreement, the date "January 1, 1963", where it appears in Article XVI, entitled "Tax Reimbursement" of the above mentioned agreement, shall be changed and amended so that said date shall thereafter read "January 1, 1969."

5.

This agreement is especially made subject to all present and future valid rules, regulations and orders of any commission or regulatory body having jurisdiction.

6.

This Amendatory Agreement shall become effective on the date of execution hereof, however, the provisions hereof shall not become operationally effective until 7:00 A.M. on January 1, 1970.

7.

Except as herein changed and amended, the above mentioned agreement of February 20, 1956, as heretofore amended, shall remain in full force and effect as written.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals to be hereunto affixed in two (2) counterparts, each of which shall constitute an original, on the day and year first written above.

(Signatures Illegible)

* * * * * * *

EXHIBIT "D"

January 12, 1971

Louisiana Power & Light Company
142 Delaronde Street
New Orleans, Louisiana 70114

Gentlemen:

Please refer to that certain contract dated May 6, 1968, under which we are selling gas to you for the requirements

of your Ninemile Point Plant located near Westwego, Louisiana.

As you are aware, our deliveries to you have been and continue to be reduced under the provisions of the Impairment of Deliveries clause in the above mentioned contract.

Beginning January 6, 1971, certain of our suppliers, due to the breakdown in main line compressors, freezing of wells and operating problems in laterals or treating plants, resulting from or aggravated by the severe cold weather required their invoking the "force majeure" provision of the contracts under which they were delivering to us.

This likewise resulted in a "force Majeure" condition under the terms of the above mentioned contract between you and United Gas Pipe Line Company and we are marking our records accordingly.

We will advise you at such time as these "force majeure" conditions have been remedied.

Yours very truly,

UNITED GAS PIPE LINE COMPANY
/s/ V. S. Brennan
V. S. Brennan
Vice President

* * * * *

August 24, 1970

Mr. Donald L. Aswell
Louisiana Power & Light Company
142 Delaronde Street
New Orleans, Louisiana 70114

Dear Mr. Aswell:

In the meeting you and your Mr. Lee B. Maurin had with our Mr. M. J. Goodwill on July 15, 1970, you raised certain questions pertinent to the anticipated curtailment by United of deliveries of gas to your Ninemile Point Power Plant during the coming winter.

To the extent that United curtails deliveries of gas to your Ninemile Point Power Plant, you have the right to utilize any substitute fuel from any source available up to the Btu content equivalent of the volumes curtailed by United.

Further, Louisiana Power & Light Company will not be obligated at a later time to take gas from United Gas Pipeline Company at rates higher than one-third of the total fuel requirements of your Ninemile Point Power Plant after Unit No. 4 is in commercial operation and United's obligation is limited to one-third of your total fuel requirement.

Trusting that this gives you the information desired, I am

Sincerely,
/s/ V. S. Brennan

* * * * *

April 17, 1968

Mr. H. L. Deloney, Vice President
Louisiana Power & Light Company
142 Delaronde Street
New Orleans, Louisiana 70114

Dear Mr. Deloney:

Thank you for your letter of April 11, 1968, relating to the Ninemile Point Fuel Contract and particularly to the Force Majeure provisions thereof we have heretofore discussed.

This letter will confirm to you that when the necessity for making other than emergency repairs or alterations to machinery or to our lines of pipe arises, we will give you seventy-two (72) hours advance notice of our plans.

We will, of course, cooperate with you to the extent possible to attempt to avoid imposing an undue burden on your operating situation.

Sincerely,
/s/ V. S. Brennan
Vice President

* * * * *

MEMORANDUM FOR FILE

May 1, 1968

SUBJECT: NINEMILE POINT GAS PURCHASE CONTRACTS—UNITED GAS PIPELINE CORPORATION AND TEXACO, INC.
MAY 1, 1968

In all recent conversations and negotiations with United

Gas Pipeline Company and Texaco, it has been thoroughly understood by Mr. Lewis, Mr. Rodrigue, Mr. Deloney and I that there is no question in anyone's mind, including United and Texaco, that the contracts about to be signed refer only to gas supply for units 1, 2, 3, and 4 at Ninemile Point. Any further additions to this plant will be subject to negotiations with any gas supplier at any time by Louisiana Power & Light Company. Both the previously referred to contracts were negotiated in an open manner on this basis with United Gas and Texaco.

The above refers especially to the United Gas Contract page 12, Article XI, section (ii) wherein "said Ninemile Point Power Plant" as used in this paragraph means only units 1, 2, 3, and 4. This has been discussed thoroughly with Mr. V. S. Brennan and Tom Ross of United Gas and they concurred in this meaning.

/s/ Don Aswell

* * * * *

May 8, 1968
Mr. W. H. Talbot
Secretarial Dept.

Dear Bill:

NINEMILE POINT—
UNITED GAS PIPE LINE COMPANY
GAS CONTRACT

We are attaching executed contract with United Gas Pipe Line Company dated May 6, 1968, covering thirty-three and one-third per cent (33⅓%) of the fuel energy requirements for the Ninemile Point steam-electric station which goes into effect when Ninemile 4 generating unit goes into operation.

Please place this document on file.

Yours very truly,
H. L. Deloney

* * * * *

May 6, 1968

Mr. H. L. Deloney
Vice President-Engineering
Louisiana Power & Light Company
142 Delaronde Street
New Orleans, Louisiana 70114

Dear Mr. Deloney:

Thank you for your letter of May 2, 1968, with which you sent us two executed duplicate originals of the new fuel supply contract for your Ninemile Point Power Plant. One duplicate original executed by us is being returned to you herewith. If you need additional copies don't hesitate to let us know.

We are indeed pleased that we have finally consummated this new contract, and I want to express my appreciation to you and your associates on your consideration throughout our negotiations.

With best regards, I am

Sincerely,
/s/ V. S. Brennan
V. S. Brennan
Vice President

• • • • •

THIS AGREEMENT made and entered into this 6th day of May, 1968, by and between UNITED GAS PIPE LINE COMPANY, a Delaware corporation, hereinafter called "Seller", and LOUISIANA POWER & LIGHT COMPANY, a Florida corporation, hereinafter called "Buyer";

WITNESSETH:

WHEREAS, on August 6, 1962, Buyer and Seller entered into an agreement relating to, among other things, the sale by Seller and purchase by Buyer of natural gas for the fuel requirements of Buyer's steam electric generating station located at Ninemile Point (hereinafter referred to as Ninemile Point Power Plant) near the Town of Westwego, Jefferson Parish, Louisiana, which said agreement has been heretofore amended from time to time;

WHEREAS, it is recognized that as of September 30, 1958,

Buyer assigned unto Louisiana Gas Service Company all its interest in said contract relating to the purchase of gas for resale and distribution in the New Orleans, Louisiana Area retaining to Buyer that portion of the contract relating to the sale by Seller hereunder and the purchase by Buyer of gas for use by Buyer in the operation of its aforesaid Ninemile Point Power Plant; and

WHEREAS, Buyer and Seller have reached agreement on the extension of the term of the contract and of the quantities to be sold and delivered thereunder and desire to terminate said agreement of August 6, 1952, and to enter into the within agreement under all of the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter contained, the parties hereto do mutually agree as follows:

I.

DEFINITIONS

The following terms, when used in this agreement shall have the following meaning:

1. The term "day" shall mean a period of 24 consecutive hours beginning as nearly as is practicable at 7:00 a.m. or at such other time as may be mutually agreed to by Buyer and Seller.

2. The term "billing month" shall mean the calendar month.

3. The term "cubic foot of gas", for the purpose of measurement of the gas delivered and for all other purposes, unless otherwise specifically provided, is the amount of gas necessary to fill a cubic foot of space when the gas is at an absolute pressure of fourteen and nine-tenths (14.9) pounds per square inch and at a base temperature of sixty (60) degrees Fahrenheit.

4. The term "Mcf" shall mean one thousand (1,000) cubic feet of gas.

5. The term "Btu" shall mean British Thermal Unit or units.

6. The term "Maximum Daily Delivery Obligation" shall mean the maximum volume of gas deliverable by Seller to Buyer hereunder in any one day.

II.

Quality

The gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that Seller may extract or permit the extraction of any of the constituents of said natural gas; provided that Seller shall not subject said gas nor permit said gas to be subjected to any treatment in the extraction of any of the constituents of said gas which shall substantially change the chemical composition of any of the component parts of said gas. Seller is to tender delivery to Buyer of natural gas which is of merchantable quality only and reasonably free from water and other objectionable liquids, reasonably free from sand and other objectionable solids and which contains not more than forty (40) grains of sulphur or twenty (20) grains of hydrogen sulphide per thousand (1,000) cubic feet.

III.

Measurement

1. Assumed Atmospheric Pressure—The average atmospheric pressure shall be assumed to be fourteen and seven-tenths (14.7) pounds per square inch.
2. Orifice Meters shall be used for the measurement of gas. Orifice meters shall be constructed and installed, and the computations of volume made, in accordance with the provisions of Gas Measurement Committee Report No. 3 of the American Gas Association as reprinted January, 1956, with any subsequent amendments or revisions which may be mutually acceptable.

The temperature of the gas shall be determined by a recording thermometer so installed that it may record the temperature of the gas flowing through the meters. The average of the record to the nearest one (1) degree Fahrenheit, obtained while gas is being delivered, shall be the applicable flowing gas temperature for the period under consideration.

The specific gravity of the gas shall be determined by a recording gravitometer so installed that it may record the specific gravity of the gas flowing through the meter or meters; provided, however, if Seller does not consider the installation of such recording gravitometer necessary,

Seller shall make spot tests with an Edwards or other standard type specific gravity balance. If the recording gravitometer is used, the average of the record to the nearest one-thousandth (0.001), obtained while gas is being delivered, shall be the applicable specific gravity of the gas for the period under consideration. If the spot test method is used, the specific gravity of the gas delivered hereunder shall be determined once monthly, the result obtained, to the nearest one-thousandth (0.001), to be applicable during the succeeding billing month.

Adjustment for the effect of supercompressibility shall be made according to the provisions of A.G.A. Report No. 3, hereinabove identified, for the average conditions of pressure, flowing temperature and specific gravity at which the gas was measured during the period under consideration, and with the proportionate values of, each, carbon dioxide and nitrogen in the gas delivered included in the computation of the applicable supercompressibility factors. Seller shall obtain appropriate carbon dioxide and nitrogen fraction values as may be required from time to time.

3. Determination of Heat Content—The Btu content of the gas delivered shall be determined for a cubic foot of gas at a temperature of sixty (60) degrees Fahrenheit, at an absolute pressure of fourteen and nine-tenths (14.9) pounds per square inch, and at the moisture content of the gas delivered. Such total heating value of the gas delivered shall be determined by Buyer, using a Thomas or other standard type calorimeter. The moisture content of the gas delivered shall be determined at a suitable point by Buyer as often as found necessary in practice.

IV.

Measurement Equipment

1. Ownership and Operation—Seller shall furnish, install, operate and maintain, at its own expense at the point of delivery, the meters, instruments and equipment of standard type necessary to measure properly, in accordance with Article III hereof, the gas to be delivered. Seller shall likewise furnish, install, operate and maintain, at its own expense, such instruments and equipment as may be necessary at points other than the point of delivery to obtain the information to measure properly, in accordance with

Article III hereof, the gas to be delivered. The metering and other equipment installed by Seller, together with any buildings erected by it for such equipment, shall be and remain the property of Seller.

Either party shall have access to the metering equipment of the other at all reasonable times, but the reading, calibration and adjustment thereof and changing of charts (unless otherwise mutually agreed upon) shall be done only by the employees or agents of the owner thereof. Charts and records from such metering equipment shall remain the property of the owner thereof. Upon request of the other party, the requested party will submit its records and charts from its metering equipment, together with calculations therefrom, for the requesting party's inspection and verification, subject to return within ten (10) days after receipt thereof, after which return they shall be kept on file by the owner thereof for the mutual use of both parties for a period of one (1) year.

2. Buyer's Meters—Buyer may, at its option and expense, install and operate meters, instruments and equipment of standard type at or near any point of delivery to check Seller's meters, instruments and equipment, but the measurement of gas delivered shall be by Seller's meters only, except in cases herein provided to the contrary. The meters, instruments and equipment installed by Buyer shall be subject at all reasonable times to inspection or examination by Seller, but the reading, calibration and adjustment thereof and changing of charts (unless otherwise mutually agreed upon) shall be done by Buyer.

3. Notice of Meter Tests—Each party shall give to the other party notice of the time of all tests of meters sufficiently in advance of the holding of the test so that the other party may conveniently have its representatives present; provided, however, that if either party has given such notice to the other party and the other party is not present at the time specified, then the party giving the notice may proceed with the test as though the other party were present.

At least once each thirty (30) days, on a day as near the first (1st) of each month as practical, each party shall calibrate its orifice meters and appurtenant instruments, all in the presence of representatives of the other, as hereinabove provided in this Section, and the parties shall jointly observe any adjustment made.

4. Correction for Errors of Meters—If, upon any test, the percentage of inaccuracy of any metering equipment is found to be in excess of two per cent (2%), registrations thereof shall be corrected for a period extending back to the time such inaccuracy occurred, if such time is ascertainable, and if not ascertainable, then back one-half of the time elapsed since the last date of calibration. If for any reason meters are out of service or out of repair, so that the amount of gas delivered cannot be ascertained or computed from the readings thereof the gas delivered during the period such meters are out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter or meters if installed and accurately registering.

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meters were registering accurately.

V.

Billings and Payments

1. Billing Date—On or before the fifteenth (15th) day of each calendar month Seller shall render to Buyer, at such office as Buyer may designate, statements showing the calculation of the monthly bill for gas delivered by Seller to Buyer during the preceding billing month.

2. Payment Date—On or before the twenty-fifth (25th) day of each calendar month Buyer shall make payments to Seller, at such office as Seller may designate, of amounts due Seller as shown by statements furnished Buyer in accordance with the foregoing Section 1.

3. Late Payment—In the event Buyer shall fail to pay any amount due Seller when the same is due, then interest thereon shall accrue at the rate of six per cent (6%) per annum from the date when such amount is due until the same is paid. If such failure to pay continues for sixty (60) days, Seller may suspend deliveries of gas, and the exercise

of such right shall be in addition to any and all other remedies available to Seller.

4. Error in Bills—In the event an error is discovered in the amount billed in any statement rendered by Seller, such error shall be adjusted promptly.

5. Late Billing—If presentation of a bill to Buyer is delayed after the fifteenth (15th) day of the month, then the time of payment shall be extended accordingly unless Buyer is responsible for such delay.

6. Access to Billing Data—Buyer and Seller shall have the right to examine the books, records and charts of the other party at all reasonable times to the extent necessary to verify the accuracy of any statement, charge or computation made pursuant to the provisions of any article of this agreement.

VI.

Possession of Gas

Seller shall be in exclusive control and possession of the gas deliverable and responsible for any damage or injury caused thereby until the same shall have been delivered to Buyer, after which delivery Buyer shall be in exclusive control and possession thereof and responsible for any injury or damage caused thereby, except damage which occurs by reason of Seller's failure to deliver gas of the quality required by this contract.

VII.

Warranty

Seller warrants generally the title to all gas delivered, and agrees to indemnify Buyer from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties or charges thereon.

VIII.

Force Majeure

1. Definition of "Force Majeure"—The term "force Majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of public

enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests, and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome; such term shall likewise include (a) in those instances where either Buyer or Seller is required to obtain servitudes, rights of way grants, permits or licenses to enable such party to fulfill its obligations under this agreement, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost, and after the exercise of reasonable diligence, such servitudes, rights of way grants, permits or licenses and (b) in those instances where either Buyer or Seller is required to furnish materials and supplies for the purpose of constructing or maintaining facilities or is required to secure permits or permissions from any governmental agency to enable such party to fulfill its obligations under this agreement, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such materials and supplies permits and permissions.

2. Limitations on Obligations.—In the event of either Buyer or Seller being rendered unable wholly or in part by force majeure to carry out its obligations under this agreement, other than to make payments due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch.

3. Strikes and Lockouts.—The settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty, and the above requirements that any force majeure shall be remedied with all reasonable dis-

patch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

IX.

Impairment of Deliveries

Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers.

X.

Periodic Requirements and Notification of Changes

All gas taken hereunder shall be taken in equal daily and hourly quantities as nearly as operating conditions will permit.

Buyer and Seller will notify each other from time to time as necessary of expected changes in the rates of daily delivery or takings of gas under this agreement, or in the pressures or other operating conditions, and the reasons for such expected changes as soon as such reasons come to the knowledge of either Buyer or Seller to the end that the other party may be prepared to meet or to take advantage of such expected changes when, as and if they occur.

XI.

Scope and Quantity

Subject to the terms, conditions and limitations hereof,

Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase and receive from Seller and pay Seller for natural gas, up to the quantities hereinafter provided, for the fuel requirements of Units 1, 2, 3 and 4 at Buyer's Ninemile Point Power Plant located at Westwego, Louisiana:

(1) From the effective date hereof and extending to the time that Buyer places its new 750,000 KW Unit No. 4 into conventional commercial operations, which date Buyer estimates to be January 1, 1971, all of Buyer's fuel requirements for the operation of Buyer's said Ninemile Point Units 1, 2 and 3, not to exceed 125,000 Mcf of 1,000 Btu per cubic foot gas in any one day which quantity, until reduced as hereinafter provided, shall be the Maximum Daily Delivery Obligation.

(ii) During the period beginning on the date that Buyer places its new 750,000 KW Unit No. 4 into conventional commercial operation 33-⅓% of the fuel requirements of Buyer's said Ninemile Point Power Plant, not however, to exceed 80,000 Mcf of 1,000 Btu per cubic foot gas in any one day which quantity shall thereafter be the Maximum Daily Delivery Obligation.

It is understood that in making deliveries of gas under this agreement, Seller shall never be required to deliver in any one hour more than 1/24th of the Maximum Daily Delivery Obligation then in effect.

It is recognized that the remaining fuel requirements, after Buyer places into conventional commercial operation its new Unit No. 4, will be supplied from a source other than Seller. Buyer agrees that it will at all times use its best efforts to receive gas simultaneously from Seller and from Buyer's other source of supply in quantities equal to the percentage of Buyer's total daily requirements then being furnished by each respective source of supply. In taking such quantities of gas Buyer will use its best efforts to receive gas from Seller and its other source of supply at all times at the operating load factor of Buyer's said Nine Mile Point Units 1, 2, 3, and 4.

It is recognized by the parties hereto that for a period of time following completion of construction of said new 750,000 KW Unit No. 4 the gas used by said unit will be for the purpose of testing and drying out such unit. Accordingly, Buyer shall advise Seller of the date when it places said unit into conventional commercial operation for

the express purpose of setting the date when the decreased Maximum Daily Delivery Obligation will become effective.

XII.

DELIVERY POINT AND PRESSURE

The gas to be sold and delivered to Buyer hereunder shall be delivered to Buyer at the outlet side of the presently existing metering and regulating station located on a tract of land adjacent to Buyer's Nine Mile Point Power Plant in Section 5, Township 13 South, Range 22 East Jefferson Parish, Louisiana.

The gas to be delivered hereunder shall be delivered at said point of delivery at such pressures as Buyer may require not to exceed 125 pounds per square inch gauge.

XIII.

TERM

This agreement shall become effective on the first day of the month following the date of execution hereof and extend to January 1, 1993.

XIV.

RATES

The price for all gas delivered by Seller to Buyer hereunder shall be as follows:

(A) During the period commencing on the effective date hereof, as set out in Article XIII, and ending at 7:00 A.M. on June 1, 1970, twenty and forty-one hundredths cents (20.41 cents) for each one million (1,000,000) Btu.

(B) During the period commencing at 7:00 A.M. on June 1, 1970, and ending at 7:00 A.M. on April 1, 1973, twenty-one and thirty four hundredths cents (21.34 cents) for each one million (1,000,000) Btu.

(C) During the period commencing at 7:00 A.M. on April 1, 1973, and ending at 7:00 A.M. on January 1, 1978, the price to be paid by Buyer to Seller for all gas delivered hereunder shall be as follows:

MONTHLY RATE

74.25 cents per Mcf when total deliveries are between 0 and 150 Mcf

34.25 cents per Mcf when total deliveries are between 151 and 1,000 Mcf

22.75 cents per Mcf when total deliveries are between 1,001 and 5,000 Mcf

21.25 cents per Mcf when total deliveries are between 5,001 and 15,000 Mcf

19.75 cents per Mcf when total deliveries are between 15,001 and 75,000 Mcf

19.25 cents per Mcf when total deliveries are over 75,000 Mcf provided, however, that the above prices shall be increased or decreased by the amount by which Seller's weighted average purchase price of gas for the preceding billing month in the New Orleans Area exceeds or is less than 17 cents per Mcf; provided, further, that the maximum amount payable in each of the above steps shall never be more than the minimum amount which would be payable in the step next below. Weighted average purchase price of gas in the New Orleans Area or any other area, as outlined in Exhibit A attached hereto, shall be determined by: (1) adding together all the volumes of gas which Seller purchased in the area and transferred into the area during the preceding billing month; (2) adding together the cost paid to be paid by Seller for the gas it purchased in the area and the cost allocable to the gas transferred into the area during the preceding billing month; and (3) dividing the total of said costs payable by the total of said volumes purchased in and transferred into the area. The resulting quotient shall be the weighted average purchase price of gas in the area. In computing weighted average purchase price, costs as used in the steps outlined above shall be:

(a) Cost allocable to gas transferred into an area shall be the result obtained by multiplying the weighted average purchase price of gas in the area from which the gas is transferred by the volume of gas transferred.

(b) Cost of gas purchased on the seaward side of the shorelines of Florida, Alabama, Mississippi, Louisiana and Texas, under contracts executed after January 1, 1968, shall be the amount payable to the producer, pipeline or other seller of such gas, plus the amount, if any, payable by Seller to others for delivery of the gas onshore; or, if Seller's facilities are used to deliver such gas onshore, an amount obtained by multiplying both of 25% of the depreciated investment, at the beginning of the preceding

billing month, in Seller's facilities used to deliver such gas onshore by the total volume of gas delivered through such facilities during said billing month, and (ii) multiplying the result so obtained by the volume of gas purchased under contracts executed after January 1, 1968, and delivered through such facilities during said billing month.

(c) The cost of any other gas purchased by Seller shall be the amount payable by Seller to the producer, pipeline or other seller thereof; provided, that in the computation of the weighted average purchase price for the Jackson Area neither the cost nor volumes of gas purchased by Seller from Tennessee Gas Pipeline Company for sale in northern Mississippi shall be included in the computation.

(d) For the purpose of determining weighted average purchase price there shall be included as part of the cost of gas, all taxes (as hereinafter defined) which may be levied upon and paid by Seller, or which Seller, under contractual or legal obligation pays to or for the person or company on which such taxes are levied, on or with respect to such gas prior to the receipt thereof by Seller in its Main Pipe Line System.

(e) For the purpose of determining weighted average purchase price, the cost of gas to Seller shall not be reduced by deductions from the amounts payable by Seller to the producer, pipeline, or other sellers thereof consequent to Seller's compression of such gas pursuant to arrangements permitted by Seller's gas purchase contracts.

(D) During the period commencing at 7:00 A.M. on January 1, 1978, and ending at 7:00 A.M. on January 1, 1983, the price for all gas delivered by Seller to Buyer hereunder shall be as set forth in (C) above except that each step of the monthly rate shall be increased by twenty-five hundredths of one cent (.25 cent) per Mcf.

(E) During the period commencing at 7:00 A.M. on January 1, 1983, and ending at 7:00 A.M. on January 1, 1988, the price for all gas delivered hereunder shall be the same rate as set forth in (C) above except that each step of the monthly rate shall be increased by fifty hundredths of one cent (.50 cent) per Mcf.

(F) Should Seller during any billing month during the periods set forth in Section (C), (D), and (E) hereof, deliver to Buyer gas hereunder containing a monthly average of less than one thousand (1,000) Btu per cubic foot, then

Seller's weighted average purchase price of gas as herein above defined in Section (C) of this article, shall be decreased 0.1% for each Btu that such monthly average is below 1,000 Btu per cubic foot.

(G) During the period commencing January 1, 1988, and extending to January 1, 1993, a price determined in the manner hereinafter provided for in this subdivision (G).

At least one hundred twenty (120) days, but not more than one hundred eighty (180) days, prior to the beginning of said period Seller shall determine and submit to Buyer in writing a new monthly rate for the gas deliverable hereunder during such period.

In the event the new monthly rate submitted by Seller represents an increase over the rate which is then in effect under the provisions of subdivision (E) hereof, Buyer shall notify Seller in writing at least sixty (60) days prior to the beginning of the period to which such new monthly rate shall apply whether or not Buyer is agreeable to such new monthly rate so submitted by Seller; it being understood that if such rate does not represent any increase over the rate which is then in effect under the provisions of subdivision (E) hereof then such new monthly rate so submitted by Seller shall be in effect hereunder for the five-year period in question and Buyer shall not have the right to terminate this contract. If such new monthly rate should represent an increase over the rate which is then in effect under the provisions of subdivision (E) hereof and Buyer notifies Seller that it does not agree to such new increased monthly rate, Seller shall have the right at any time within thirty (30) days after receipt of Buyer's notice to continue the contract in force throughout the five-year period in question by notifying Buyer that it will continue deliveries of gas through such period at the rate which is then in effect under the provisions of subdivision (E) hereof. However, if such new monthly rate should represent an increase over the rate which is then in effect under the provisions of subdivision (E) hereof and Buyer notifies Seller that it does not agree to such new monthly rate and Seller does not exercise its right in accordance with the foregoing to continue the contract in force, such contract shall, unless Buyer exercises its right to purchase gas during the period and on the conditions set forth in the next succeeding paragraph hereof, automatically terminate on the date of expiration of

the period next preceding the period for which such new monthly rate is applicable. Should Buyer exercise the right set forth in the next succeeding paragraph hereof, this contract shall automatically terminate on the expiration of the right so granted to Buyer.

If Buyer does not agree to any such new monthly rate and Seller does not elect to continue the contract in force as above provided and Buyer has not made arrangements for its fuel requirements prior to the beginning of the period for which such new monthly rate is applicable, Buyer shall, upon giving Seller notice prior to the commencement of such period, have the right to continue to purchase gas from Seller during the period Buyer is making any necessary physical changes or arrangements for its fuel requirements on the same terms and conditions as set forth herein except that the price to be paid for gas delivered shall be in accordance with said new monthly rate so determined by Seller for the period under consideration and to which such monthly rate Buyer did not agree; provided, however, that Buyer shall notify Seller immediately upon the completion of such arrangements for supplying its said requirements at which time the right granted to Buyer in this paragraph shall terminate and provided further that under no conditions shall this right extend beyond one year from the date this contract is subject to termination as hereinabove provided in the preceding paragraph hereof.

XV.

Tax Reimbursement

(A) For the period hereof ending at 7:30 A.M. on April 1, 1973, the following tax reimbursement provisions shall be effective:

Buyer agrees to reimburse Seller for all taxes which may be levied upon and paid by Seller or which Seller under contractual or legal obligation pays to or for the person or company on which such taxes are levied on or with respect to the gas delivered hereunder; provided, however, that no reimbursement shall be made to Seller under the provisions of this paragraph for such specific taxes as were in effect on June 1, 1965, up to the respective rates thereof on said date which Seller was then paying directly or indirectly. In the event such specific taxes as were in effect on June 1, 1965,

are decreased below the respective rates thereof on said date, Seller shall thereafter credit Buyer's monthly bill with the amount by which such taxes applicable to the gas delivered hereunder during the billing month in question were so decreased.

(B) For the period beginning at 7:00 A.M., on April 1, 1973, and extending for the remainder of this contract the following tax reimbursement provisions shall be effective:

Buyer agrees to reimburse Seller for all taxes which may be levied upon and paid by Seller or which Seller under contractual or legal obligation pays to or for the person or company on which such taxes are levied, on or with respect to the gas delivered hereunder; provided, however, that no reimbursement shall be made to Seller under the provisions of this article for any taxes which were included in the weighted average price of gas under the provisions of the Monthly Rate set forth in subsections (C) (D) and (E) of Article XIV hereof.

(C) The term "taxes" as used hereinafter in (A) and (B) shall mean any tax (other than ad valorem, income or excess profits taxes), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sales price of the gas in question; provided, however, that the term "taxes" shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the State as a foreign corporation.

XVI.

Superseding of Prior Agreements

This agreement supersedes, cancels, and terminates as of the effective date of this agreement as set forth in Article XIII hereof that certain agreement between the parties dated August 6, 1952, as heretofore amended from time to time, insofar as it relates to the sale of gas by Seller to Buyer for use as fuel in the operation of Buyer's Ninemile Point Power Plant located at Westwego, Jefferson Parish, Louisiana. Both parties shall on said date be released from any and all obligations as between the parties hereto, under

said agreement of August 6, 1952, except as to any liabilities accruing or occurring prior to such date which have not been satisfied.

XVII.

Duly Constituted Authorities

This agreement is especially made subject to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction.

XVIII.

Descriptive Headings

The descriptive headings of the provisions of this agreement are formulated and used for convenience only and shall not be deemed to affect the meaning or construction of any such provisions.

XIX.

Successors and Assigns

This contract shall be binding upon and inure to the benefit of the respective heirs, representatives, successors and assigns of the parties hereto.

If all or any part of Buyer's plant, facilities, and/or other property, into which the gas sold hereunder is received and or utilized, are voluntarily sold or exchanged by Buyer, then and in such event, Buyer agrees that it will cause the person, firm or corporation so acquiring such property to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement, and Buyer further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

If all or any part of Seller's pipe line system through which the gas sold hereunder is delivered to Buyer is voluntarily sold or exchanged by Seller and Seller will thereby be rendered unable to supply to Buyer any gas which it is obligated to supply hereunder, then, and in such event, Seller agrees that it will cause the person, firm or corporation so acquiring such property to take and hold the same

subject to this Agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement applicable to the property so sold or exchanged and Seller further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals to be hereunto affixed in two (2) counterparts, each of which shall constitute an original, on the day and year first above written.

WITNESSES:
/s/ John W. Hayes
/s/ Dina Roberts

UNITED GAS PIPE LINE COMPANY
By /s/ V. S. Brennan
Vice President

ATTEST:
/s/ J. R. DuBois
Assistant Secretary

WITNESSES:
/s/ H. L. Deloney
/s/ Donald L. Aswell

LOUISIANA POWER & LIGHT COMPANY
By /s/ (Illegible)
Senior Vice President

ATTEST:
/s/ Illegible
Asst. Secretary

NOTE: Map attached to the above (sent in the original).

* * * * *

UNITED GAS PIPE LINE COMPANY—LOUISIANA POWER & LIGHT COMPANY PROPOSED CURTAILMENT PER DAY OF GAS BY MONTH, 1971 ASSUMING ALLEGED 50,000 MCF/DAY SYSTEM SHORTAGE

	Contract amount cubic feet/day	Proposed Maximum Daily Delivery cubic feet day
Sterlington	30,000,000	
April, 1971		24,823,000
May, 1971		24,824,000
June, 1971		24,826,000

July, 1971		24,827,000
August, 1971		24,820,000
September, 1971		24,827,000
October, 1971		24,823,000
Nine Mile Point	80,000,000	
April, 1971		47,500,000
May, 1971		63,767,000
June, 1971		65,281,000
July, 1971		59,207,000
August, 1971		62,000,000
September, 1971		66,747,000
October, 1971		1[illegible]56,000

Exhibit "E"

Exhibit "F"

UNITED STATES OF AMERICA
Before the
FEDERAL POWER COMMISSION

UNITED GAS PIPE LINE COMPANY — DOCKET NO. RP71-29

SUPPLEMENTAL PETITION
FOR DECLARATORY ORDER

United Gas Pipe Line Company (United) hereby supplements its original petition in this proceeding as amended.

I.

This supplemental petition is made necessary by the fact that United's field supplies of gas continue to be insufficient to meet the demands of United's customers. Thus it is necessary that United's curtailment program be extended from April 1, 1971, at least through October 31, 1971.

This extended curtailment program represents a continued implementation of the "impairment of deliveries" provisions of United's tariff and direct sales contracts cited in United's original petition herein. United requests that the Commission declare that this extended curtailment program is in accordance with the terms of said tariff and contracts.

II.

The reasons for and details of United's extended curtailment program are fully set out in the prepared testimony of United's witnesses Barnett, Clopton and Belvin and the exhibits sponsored by these witnesses, said testimony and exhibits being filed concurrently herewith. In brief, the extended curtailment program affects only gas used for industrial purposes and gas used to generate electricity which in turn is used for industrial purposes, such gas having the lowest priority under the "impairment of deliveries" clauses in United's tariff and direct sales contracts. (Such gas is referred to hereinafter as "industrial gas".)

United has used all of the resources available to it to determine the volume of industrial gas sold to each of its customers in order that the extended curtailment program may be applied on a ratable basis. One change from the calculations for the winter curtailment reflected in United's original petition is that interruptible industrial gas is included in the curtailment volumes for the extended program which covers the non-winter months. Such interruptible loads were excluded in the winter program calculations on the assumption that they would be fully curtailed while that program was in effect. That assumption does not apply to the extended program.

As reflected in the testimony of Mr. Clopton, United has calculated the base requirements for each of its customers during each month of the period covered by the extended program. In general, these base requirements reflect actual daily average deliveries to such customers in the like period in 1970, adjusted (a) to eliminate the effect of force majeure and other abnormal situations, (b) to reflect normal anticipated growth in domestic gas and electrical loads, (c) to reflect addition of new electrical and industrial capacity contemplated by United's existing commitments, and (d) to eliminate the effect of voluntary reductions by United's pipeline customers in 1970.

The testimony and exhibits filed concurrently herewith show that the required curtailment has been applied ratably to United's customers by deducting each customer's prorata share of the industrial gas curtailment from each customer's base requirements to determine the volume of gas each customer can take on a daily average basis during each month covered by the extended program. The estimated

curtailment of some 50,000 Mcf per day on a system-wide basis will have a minimal impact on United's customers when spread on the indicated prorata basis. In addition, however, new so-called "dump sales" cannot be made by such customers under the extended program. This latter restriction will primarily affect United's city gate customers with substantial volumes of valley gas that might otherwise be sold for the first time to such loads as steam electric plants. The making of such sales could quickly put United in the position of having to curtail domestic customers in the 1971-1972 heating season. The restriction against such sales is thus designed to protect the domestic customers served with United's gas, including the domestic customers of the distributors who might otherwise make such new "dump sales".

III.

United continues to make every possible effort to purchase a sufficient supply of gas to eliminate the need for curtailments. These efforts include the purchase of very substantial volumes of very high cost spot gas. Despite these efforts, United has been unable to locate, much less place under contract, the substantial new interstate reserves required to supply the growing demands of United's customers.

United's efforts thus far have enabled it to hold actual and projected curtailments to relatively low levels. As more concentrated and wide-spread effort is brought to bear on alleviating our national energy crisis, it is hoped that the national gas shortage will be solved expeditiously so that curtailments can become a thing of the past.

United respectfully requests that the Commission issue its order declaring that the extended curtailment program described herein and in the testimony and exhibits filed concurrently herewith is in accordance with the terms of United's tariff and direct sales contracts.

Respectfully submitted,

UNITED GAS PIPE LINE COMPANY
By: /s/ William B. Cassin
WILLIAM B. CASSIN
Vice President and
General Attorney

(Title Omitted)

No. 16,637

SUPPLEMENTAL AND AMENDED COMPLAINT

Now comes complainant, Louisiana Power & Light Company ("LP&L"), and amends its complaint filed herein on March 31, 1971 against defendants, United Gas Pipe Line Company ("United") and Pennzoil United, Inc. ("Pennzoil"), by incorporating further an additional cause of action, as follows:

I.

By adding additional paragraphs to follow Paragraph 10 of the original complaint, as follows:

10(A) On March 31, 1971, at a conference held in the chambers of a judge of this Court, counsel for United and Pennzoil assured this Court and counsel for LP&L that LP&L would be curtailed in its deliveries of natural gas from United to the extent of only 7-10th of 1% of its requirements in the summer of 1971. On the morning of April 26, 1971, contrary to such assertions and assurances, United's dispatcher informed the Nine Mile Point Generating Station of LP&L that United would deliver no more than 47,000 mcf of natural gas per day to said generating station despite the fact that the contract between the parties calls for a maximum delivery of 80,000 mcf of natural gas per day to said generating station.

10(B) On information and belief, LP&L alleges that the curtailment of delivery to its Nine Mile Point Generating Station by United on April 26, 1971, and the threatened curtailment continuing thereafter was not and is not required to supply the needs of domestic consumers of gas on said days; and is not due to an alleged shortage of gas on said days, but that such curtailment was and is for the purpose of providing United with excess gas to insert in its underground storage reservoirs on April 26, 1971 and on a continuing basis thereafter.

10(C) Said curtailment of delivery by United is in breach of and in violation of the delivery obligations of United in its contract with LP&L for the Nine Mile Point Generating Station, and is contradictory to and in violation of the "impairment of deliveries" article in said contract quoted hereinabove in Paragraph 6.

10(D) Unless United and Pennzoil are temporarily enjoined and restrained from such unlawful curtailments by this Court, United will continue to breach its obligation to LP&L under such contract to the continuing and irreparable damage of LP&L, and United should be required to sell and deliver to LP&L the volume of natural gas that United agreed to sell and deliver in said contract in the full contract amount of 50,000 mcf per day to the Nine Mile Point Generating Station of LP&L.

10(E) As a result of the said action by Pennzoil and United, LP&L has been required to seek additional gas in order to operate its Nine Mile Point Generating Station on a temporary and uncertain "spot" basis for "transfer gas" at a considerably greater expense to LP&L and at a considerably greater risk to its ability to generate electricity; additional gas is necessary for LP&L to avoid a serious impairment of its ability to meet its summertime peak electric generating load requirements and to avoid a possible power shortage in the LP&L and adjoining service areas.

10(F) LP&L has no adequate remedy at law herein, inasmuch as electricity is a product which cannot be stored and must be supplied when the demand therefor exists, or not at all, and in view of the fact that LP&L has some $84,000,000 invested in the Nine Mile Point Generating Station alone, in addition to its investment in its transmission lines and distribution lines connected thereto and its interties dependent thereon, and there is no remedy for the loss of use of such investment or the loss of revenue from its inability to serve electricity or the loss of electricity to the general public.

10(G) Accordingly, United's arbitrary breach of contract, as set forth herein, is preventing, and unless enjoined will continue to prevent the normal and necessary operation of LP&L's Nine Mile Point Generating Station and may necessitate a curtailment of the operation of said station at a time when such operation is vitally necessary, not only to complainant itself, but also in the general public interest.

10(H) Additionally, on March 29, 1971, United advised LP&L that United anticipated a further curtailment program for the "winter months" of November 1, 1971 to March 31, 1972 of some 44.7 million cubic feet of natural gas

throughout its pipe line system, which United proposes to prorate among its customers on the same basis as its present summer and past winter curtailment programs. Such curtailment will even more seriously affect the Sterlington and Nine Mile Point Generating Stations of LP&L, particularly in view of the fact that it exceeds by more than four times the present summer curtailment program and is more than twice the winter curtailment program instituted in the winter of 1970-71. Said curtailment program will be in further violation of the delivery obligations of United and will not be in accordance with the contract articles on "impairment of delivery" quoted hereinabove in Paragraphs 5 and 6. A copy of United's estimate of system demand and supply, November 1971 through March 1972, as filed in FPC Docket No. RP71-29, is attached hereto as Exhibit "G".

10(I) United has further advised LP&L that it intends to pursue requiring the conversion of all of its electric power company "boiler fuel" customers to the use of crude oil for the generation of electricity. LP&L's Sterlington Generating Station has no present alternate fuel capability for the burning of crude oil rather than natural gas, and it is estimated that in excess of $4,000,000 would be required to be invested in such facilities for Sterlington alone, with little, if any, possibility of such expense being recovered by LP&L through a rate increase from the Louisiana Public Service Commission. A copy of the memorandum of March 22, 1971 from Mr. Cassin, Vice President and General Counsel of United, to Mr. Kerr, General Counsel with Pennzoil, setting forth such program is attached hereto as Exhibit "H".

WHEREFORE, LP&L prays that this Court:

(1) Grant Leave to LP&L to file its amended complaint;

(2) Issue a Temporary Restraining Order as provided by Rule 65b of the Federal Rules of Civil Procedure, in the form prayed for in the original complaint herein, and additionally restraining United from curtailing deliveries to LP&L's Nine Mile Point Generating Station forthwith, and otherwise breaching its contract with LP&L and restraining and enjoining Pennzoil from including such action and breach;

(3) Issue a preliminary injunction in accordance with Rule 65 of the Federal Rules of Civil Procedure as prayed for in the original and this amended complaint;

(4) Issue a permanent injunction in said respect;

(5) Grant such other and further relief at law or in equity as the Court may deem just and proper.

DATED:
April 27, 1971

THEUS, GRISHAM, DAVIS & LEIGH
THOMAS W. LEIGH
By /s/ Thomas W. Leigh

MONROE & LEMANN
ANDREW P. CARTER
EUGENE G. TAGGART
CHAS. KING MALLORY

By /s/ Andrew P. Carter
ATTORNEYS FOR LOUISIANA POWER & LIGHT COMPANY, *Plaintiff.*

VERIFICATION

STATE OF LOUISIANA
PARISH OF ORLEANS

E. A. Rodrigue, being duly sworn deposes and says that he is the President of Louisiana Power & Light Company, plaintiff herein, and that he has read the foregoing Supplemental and Amended Complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged in information and belief, and as to those matters he believes them to be true.

/s/ E. A. Rodrigue,
E. A. RODRIGUE,
President

Sworn to and subscribed before me this 27 day of April, 1971.

/s/ Steven O. Medo, Jr.
Notary Public

March 26, 1971

To All Jurisdictional Customers
Of United Gas Pipe Line Company
And Parties In Docket No. RP71-29

Re: FPC Docket No. RP71-29
United Gas Pipe Line
Company

Pursuant to request made during the hearing on March 9, 1971 in the above captioned proceeding, United Gas Pipe Line Company herewith encloses for your information copy of graph "Preliminary Estimate of System Demand and Supply—November 1971 Through March 1972".

This estimate on the demand side assumes that, subject to our contractual delivery obligations, domestic uses of gas will increase approximately 3% for our city gate customers, consumption of electricity generated in power plants which we supply will increase approximately 8%, and our pipeline customers will take as close to their contractual maximums as they possibly can. The weather conditions upon which this estimate is based project a normal winter insofar as the weather data in our files is concerned, and these data go back more than 30 years.

On the supply side, this estimate is based upon very limited acquisitions of new gas reserves, and also assumes that we will no longer be authorized by the Federal Power Commission, as of November, 1971, to make emergency purchases of spot gas.

Yours very truly,

United Gas Pipe Line Company
/s/ William B. Cassin
Vice President and
General Attorney

Exhibit "G"

Note: The graph attached to the above is sent in the original.

March 22, 1971

To: Baine P. Kerr
From: William B. Cassin
Re: Obtaining gas supply through displacement of sales for power generation by coordinated use of substitute fuels

BACKGROUND

United Gas Pipe Line Company is experiencing a sharp and worsening gas supply shortage on its system because of the unheralded and unprecedented national shortage of new gas discoveries. United's shortage first manifested itself on a few peak days in the 1969-70 winter when United found it necessary to curtail some industrial loads to maintain service. During this period, about 2,000,000 Mcf were curtailed. In the 1970-71 winter, United's supply situation had become even more critical and a fully developed curtailment program was implemented which resulted in 20,000,000 Mcf * in curtailments.

Now, United, in order to fill its storage fields in preparation for the 1971-72 winter, has projected curtailments of some 10,000,000 Mcf * in the period of April through October 1971. Moreover, if substantial new supplies cannot be added to United's system before November of 1971, and even assuming that United's storage fields are completely filled by then to their full design capacity, United is projecting curtailments in the 1971-72 winter in the vicinity of 50,000,000 Mcf based on an average winter.

United's projections presently indicate that, barring a reversal of current trends at an earlier date than presently anticipated, curtailments will continue to be required over the next three or four years, reaching their peak in the 1972-73 winter and receding thereafter. These long range projections are not particularized in specific volumes, but rather, deal only with general trends of supply and demand on United's system.

The Problem

United, unlike most pipeline companies, has express pro-

* These curtailment figures would be much higher if United could not purchase spot gas under FPC Order Nos. 402-A and 418.

visions in its tariffs and direct sales contracts which spell out the order of priority in the event of a shortage. Domestic gas uses are the highest priority. Next are domestic electricity uses which rely on gas fired boilers. Last are industrial uses. Although United has been forced by disputes with some of its customers to request a declaratory order affirming United's construction of these curtailment clauses (FPC Docket No. RP 71-29), the clauses are sufficiently clear so that an orderly program of curtailment may be, and in fact has been established to deal with fairly severe gas shortages.

As the magnitude of projected shortages grows, however, and as curtailments become 365-day-a-year affairs, economic, political and human factors begin to intervene and undercut the efficacy of the cut-and-dried contract language designed to cope with shortage situations. Potential curtailments of domestic uses of electricity and gas aside, long term and deep curtailments of industrial gas can produce severe hardships on the industries involved, their employees and the communities in which they are situated. The fact that a contract executed in an era of gas supply sufficiency authorizes and even requires a curtailment which may close down a paper mill, or nylon plant, or refinery, or chemical works, is no comfort to United.

In short, something more than a logical and equitable curtailment program is required to mitigate the impact of the current and projected shortages on United's system. Pending the time when the new initiatives of the current FPC can take effect and bring forth large new reservoirs of gas available for commitment to the interstate market, interim measures must be taken to maintain energy supplies for the markets served by United and its customers.

The Solution

United's largest class of direct customers in terms of volumes are the six major power companies and one large power cooperative who buys gas from United for boiler fuel. Attached as Appendix I is a tabulation showing, for each of these customers, the volumes United delivered to each at their various plants, showing their 1970 coincidental and non-coincidental peak days and their 1970 annual volumes. Attached as Appendix II is a tabulation showing the Maximum Daily Delivery Obligation of United to each plant as

well as the standby or alternate fuel capabilities of each plant and unit. Attached as Appendix III is a tabulation showing the work required to convert the plants to full-time use of alternate fuels, and a rough estimate of the costs involved in providing required additional fuel storage capacity.

From the information contained in the Appendices, it can be seen that conversion of all of these generating units or even a fraction thereof, to full-time use of an alternate fuel will substantially reduce the need for curtailing United's customers. The amount of relief available cannot presently be definitely estimated since timing problems with regulatory lag and construction activities cannot be fully anticipated. Of course, the sooner substantial conversion could be effected, the greater will be the contribution toward solving the problem.

United's Proposal

United proposes that the Commission, in exercise of its powers under Sections 4, 5, 7, 10 and 16 of the Natural Gas Act, implement the following program:

1. United will be authorized to cease or reduce deliveries of gas to the power plants on such dates as said plants can convert to full-time use of alternate fuels. The cessation or reduction of deliveries will be effected only during such period as United is unable to contract for sufficient long term gas supplies to serve existing demands of existing customers and normal growth in domestic use demands within existing contract limitations.

2. United will amend its contracts with its power company customers to provide for such cessation and also to provide for the construction of necessary facilities by such customers and the apportionment of capital costs and fuel expenses in the manner hereafter detailed.

3. Recognizing the long-term benefits to their electric customers in continuity and reliability of service, the electric generating companies will bear the capital costs of the conversions and include these costs in their rate bases.

4. Recognizing the benefit to United's other customers of continued gas service, such other customers will bear the cost of alternate fuels used by the electric generating companies, to the extent such costs exceed said companies' contracted gas costs, on a heat equivalent basis.

5. United will maintain full and complete records and make periodic reports to the Commission showing:

a. The amount of gas which would have to be curtailed, with both demand and supply projected for the succeeding twenty-four months but for implementation of this program.

b. The excess cost, on a heat equivalent basis, of the alternate fuels used by the electric companies involved, with complete data as to quantities of fuel, heat value, dates of consumption, and cost of purchase, handling and storage.

c. The quantities of gas sold to each of its customers on a monthly basis, with a comparison showing maximum contract volumes and maximum volumes actually taken. These quantities will be projected at least three months beyond the date of each report.

6. United will amend its power company contracts to substitute for the present fixed prices a price consisting of, (a) United's average cost of gas, (b) a reasonable transportation charge, and (c) the surcharge described below.

7. United will amend its FPC Rate Schedules and direct industrial agreements to provide that all of its customers will bear the electric companies' excess costs of alternate fuels through payment of a surcharge. Such surcharge will be allocated to each customer in a ratio based on the amount of gas which such customer would have been curtailed, under the program provided in United's tariff, compared to the total projected curtailment. The amount of this surcharge will be computed monthly based on the latest data contained in the records and reports required of United under this program. The surcharge will be rounded to the nearest tenth of a mill. United will adjust the surcharge to account for any differences between the amounts sought to be recovered thereunder and the amounts actually recovered.

8. Any of United's direct customers which refuses to agree to the contract amendments necessary to effect this program will be curtailed as if the program were not in effect at all. Additionally, should a curtailment be necessary for any reason despite implementation of this program, such non-consenting direct customers, if any, will be curtailed 100% before any of United's other customers are curtailed. Finally, United will be directed not to renew its contracts with such customers when they expire.

CONCLUSION

The program outlined above may be unprecedented, but so is the emergency which makes it necessary. The program is designed to free up the largest amount of gas possible in the shortest time possible. Furthermore, the program equitably allocates the costs among the beneficiaries, including domestic consumers, who but for this program would have to shoulder greatly increased rates in order for United to recover its full cost of service.

The program is also self-limiting in that the capital costs are to be borne by the primary short-and-long-term beneficiaries of such costs—the electric consumers—and the expenses will be prorated and recovered on virtually a current basis. When the expenses cease, *i.e.*, when there is enough gas to supply the power companies and United's other customers, the surcharges will cease.

The program is one which the Commission can implement and supervise within current statutory authority. It is in the public interest and it is certainly required by the public convenience and necessity that the program be implemented at the earliest possible date.

Filed
April 27, 1971

* * * * *

(Title Omitted)

No. 16,637

BOND

KNOW ALL MEN BY THESE PRESENTS that we, Louisiana Power & Light Company, as principal, and The Travelers Indemnity Company as surety, are held and firmly bound unto United Gas Pipe Line Company, and Pennzoil United, Inc., defendants in the above entitled action, in the sum of $5,000.00 to be paid to the said United Gas Pipe Line Company, and Pennzoil United, Inc., their administrators, and assigns to which payment we bind ourselves and our administrators, jointly and severally.

Sealed with our seals and dated the 27 day of April, 1971.

WHEREAS, the said Louisiana Power & Light Company has obatined from the United States District Court for the

Western District of Louisiana a temporary restraining order against the said United Gas Pipe Line Company, and Pennzoil United, Inc., upon condition that plaintiff execute and file a good and sufficient bond for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Now, Therefore, the condition of this obligation is such that if the said United Gas Pipe Line Company, or Pennzoil United, Inc. shall pay any costs or damages which may be incurred by any party who is found to have been wrongfully enjoined or restrained by such temporary restraining order, then this obligation shall be void; otherwise, it shall remain in full force and effect.

The Travelers Indemnity Company	Louisiana Power & Light Company
By /s/ Linda F. Bates *Attorney-in-Fact*	By /s/ (Illegible)
	Approved 4/28/71
	/s/ Ben C. Dawkins, Jr., *U.S. Dist. Judge*

Filed
April 28, 1971

* * * * *

(Title Omitted)

No. 16,637

TEMPORARY RESTRAINING ORDER

This cause came on to be heard contradictorily on the verified complaint and supplemental complaint of plaintiff and the certificate of Andrew P. Carter, Esq., attorney for plaintiff, and it appearing to the Court that the defendants are committing acts, and are about to commit acts as set forth in plaintiff's complaint, and will continue to do so unless restrained by order of this Court, and that immediate and irreparable injury, loss or damage will result to plaintiff; and that plaintiff entered into a valid and existing contract for the supply of natural gas to its Sterlington and Nine Mile Point generating stations with defendant United Gas Pipe Line Company (United) under the terms of which defendant United is obligated to supply 25,000 mcf of natu-

ral gas on a daily basis to plaintiff at Sterlington with no hourly limitations, and 80,000 mcf of natural gas on a daily basis to Nine Mile Point with no hourly limitations, and it further appearing that defendant was supplied said gas on a daily basis pursuant to said contract, but has and is wrongfully planning to curtail said supply all in breach of said contract, and will continue to do so unless restrained by this Court to the considerable immediate peril and exposure to Louisiana Power & Light Company's system and those systems with which it is interconnected, and to the continuing economic detriment of Louisiana Power & Light Company in that it cannot operate its Sterlington and Nine Mile Point generating stations at full capacity, and fulfill its contractual and legal obligations to provide electric service and standby generating capacity; it is therefore ordered that United Gas Pipe Line Company, its officers, agents, representatives, employees, attorneys, and all persons in active concert and participation with it, including its parent company, Pennzoil United, Inc. be and they are hereby restrained from in any manner either directly or indirectly curtailing the supply of natural gas provided to Louisiana Power & Light Company in breach of the contracts between plaintiff and defendant, and said persons are hereby affirmatively directed to provide Louisiana Power & Light Company with natural gas on a daily basis pursuant to the terms of the contracts between plaintiff and defendant, United, without curtailment; provided that plaintiff first give security in the sum of $5,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, such bond to be approved by the Court or by the Clerk of the Court; and

It Is Further Ordered that this Order expire within 10 days after entry unless within such time as the Order for good cause shown is extended, or unless the defendant consent that it may be extended for a longer period; and

It Is Further Ordered that Plaintiff's application for a preliminary injunction be sent down for hearing on the 11th day of May, 1971, at 10:00 o'clock A.M. at Shreveport, Louisiana; and

It Is Further Ordered that copies of this order and of plaintiff's complaint and supplemental complaint and the attachments submitted therewith, together with proper

summons issued by the Clerk of this Court, be immediately served by the United States Marshal upon the defendants.

Issued at Shreveport, Louisiana, April 27, 1971, at 6:15 o'clock P.M.

/s/ Ben C. Dawkins, Jr.
United States District Judge

Service accepted and citation
waived, reserving all other rights.
This 29th day of April, 1971.

/s/ John T. Guyton
Attorney for United Gas Pipe Line Company & Pennzoil United, Inc.

Filed
April 28, 1971

* * * * *

(Title Omitted)

No. 16,637

The Federal Power Commission moves for leave to intervene as a defendant in this action in order to assert the defenses set forth in its proposed motion to dismiss, hereto attached, on the ground that it has exclusive jurisdiction under the Natural Gas Act (15 U.S.C.A. § 717 *et seq.*) over curtailments in service of natural gas which is transported or sold in interstate commerce. Accordingly, it has a defense to plaintiff's claim which presents questions of law in common to the main action.

/s/ Donald E. Walter
DONALD E. WALTER—Per
GORDON GOOCH
U.S. Attorney
Attorney for Federal Power Commission
Applicant for Intervention

Office of U.S. Attorney
Shreveport, Louisiana

By /s/ Gordon Gooch
GORDON GOOCH
General Counsel
Federal Power Commission
Washington, D.C. 20426

Of Counsel:
s George P. Lewnes
GEORGE P. LEWNES
Assistant General Counsel

s George W. McHenry, Jr.
GEORGE W. McHENRY, JR.,
Commission for Staff Counsel

Filed
April 28, 1971

* * * * *

(Title Omitted)
No. 16,637

MOTION TO DISMISS

The Federal Power Commission, as intervenor, moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action on the ground that the Court lacks jurisdiction over the subject matter, such jurisdiction being exclusively vested with the Federal Power Commission by virtue of Sections 4, 5 and 16 of the Natural Gas Act.

3. To dismiss the action on the ground that plaintiff has failed to exhaust its administrative remedies under Section 19 of the Natural Gas Act.

Respectfully submitted,
s Donald E. Walter
DONALD E. WALTER, per
GORDON GOOCH
By /s/ Gordon Gooch

Of Counsel:
s George P. Lewnes
s George W. McHenry, Jr.

Filed
April 28, 1971

* * * * *

(Title Omitted)

No. 16,637

MOTION TO DISSOLVE AND DISMISS

United Gas Pipe Line Company and Pennzoil United, Inc., Defendants, move the Court to dissolve the Temporary Restraining Order heretofore issued and to dismiss Plaintiff's complaint for the following reasons:

(1) The complaint fails to state a claim upon which relief can be granted.

(2) The Court lacks jurisdiction over the subject matter, exclusive jurisdiction being vested in the Federal Power Commission under and by virtue of the Natural Gas Act (15 USCA § 717 et seq.).

(3) Because this is a collateral attack upon proceedings now in progress before the Federal Power Commission, to which proceedings Plaintiff is a party, and Plaintiff has failed to exhaust its administrative remedies under the Natural Gas Act.

Respectfully submitted,
William B. Cassin
William R. Choate
Wm. O. Crain, Jr.
John T. Guyton
By /s/ John T. Guyton

Filed
April 29, 1971

* * * * *

(Title Omitted)

No. 16,637

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

The Federal Power Commission, Intervenor, moves the Court to dissolve the Temporary Restraining Order previously granted in this matter as improvidently granted on the ground that the Federal Power Commission has exclu-

sive jurisdiction of curtailments in service by interstate natural gas pipe line companies.

Respectfully submitted,
/s/ Donald E. Walter
/s/ George W. McHenry, Jr.

Filed April 29, 1971

* * * * *

(Title Omitted)

No. 16,637

JUDGMENT

Pursuant to reasons handed down this date, it is hereby ordered, adjudged and decreed;

That the motion to intervene herein by the Federal Power Commission is hereby granted and the Federal Power Commission is hereby made a party to these proceedings;

That the Temporary Restraining Order heretofore issued on April 27, 1971, be, and the same is hereby dissolved;

That the plaintiff's suit is hereby dismissed for lack of jurisdiction of this Court.

Thus Done and Signed at Shreveport, Louisiana, this 29th day of April, 1971.

/s/ Ben C. Dawkins, Jr.
United States District Judge

Filed April 29, 1971

* * * * *

(Title Omitted)

No. 16,637

NOTICE OF WRIT AND/OR APPEAL

Notice is hereby given that Louisiana Power and Light Company, plaintiff above named, hereby appeals and/or applies for a writ to the United States Court of Appeals for the Fifth Circuit from the judgment entered in this action on the 29th day of April, 1971.

Theus, Grisham, Davis & Leigh
Thomas W. Leigh
/s/ Thos. W. Leigh

MONROE & LEMANN
ANDREW P. CARTER
EUGENE G. TAGGART
CHAS. KING MALLORY
/s/ Andrew P. Carter.

Filed
April 29, 1971

* * * * *

(Title Omitted)

No. 71-1773

Court of Appeals
Fifth Circuit

ORDER VACATING JUDGMENT
OF DISTRICT COURT

Upon consideration of the application by Louisiana Power & Light Company for writs of mandamus and certiorari and/or for expedited appeal, and motion for injunction pending appeal, and good cause appearing for relief granted herein,

IT IS ORDERED that the judgment of the United States District Court, Western District of Louisiana, in "Louisiana Power & Light Company v. United Gas Pipe Line Company, et al." Civil Action No. 16,637, dated April 29, 1971, be and it is hereby vacated and set aside insofar as it dissolved the temporary restraining order of April 27, 1971 in that action and dismissed that proceeding;

IT IS FURTHER ORDERED that the temporary restraining order in the above said Civil Action No. 16,637, dated April 27, 1971, be and it is hereby reinstated and made effective pending consideration of the application for writs herein and/or expedited appeal, and subject to further orders as may be forthcoming from a panel of this Court.

Thus done and signed at New Orleans, Louisiana, this 1st day of MAY, 1971.

/s/ John Minor Wisdom
JOHN M. WISDOM, *Circuit Judge*

Filed
May 3 '71
Edward W. Wadsworth
Clerk

* * * * *

(Title Omitted)

No. 16,637

BOND FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, Louisiana Power & Light Company as principal and The Travelers Indemnity Company as surety, are held and firmly bound unto United Gas Pipe Line Company, Pennzoil United, Inc., and the Federal Power Commission in the full and just sum of TWO HUNDRED FIFTY AND NO 100 ($250.00) DOLLARS, to be paid to the said United Gas Pipe Line Company, Pennzoil United, Inc. and the Federal Power Commission, their successors, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our successors, assigns, heirs, executors, and administrators, jointly and severally by these presents.

Sealed without seals and dated this 29th day of April, 1971.

WHEREAS, on April 29, 1971, in an action pending in the United States District Court for the Western District of Louisiana, between Louisiana Power & Light Company as plaintiff and United Gas Pipe Line Company and Pennzoil United, Inc. as defendants, a judgment was rendered against the said Louisiana Power & Light Company and the said Louisiana Power & Light Company having filed a notice of appeal from such judgment to the United States Court of Appeals for the Fifth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the said Louisiana Power & Light Company shall prosecute its appeal to effect and shall pay costs if the appeal is dismissed or the judgment affirmed, or such costs as the said Court of Appeals may award against the said Louisiana Power & Light Company if the judgment is modified, then this obligation is to be void; otherwise to remain in full force and effect.

LOUISIANA POWER & LIGHT COMPANY,
Principal
By /s/ Andrew P. Carter
THE TRAVELERS INDEMNITY COMPANY
By /s/ W. E. Leigh

Filed
May 3, 1971

* * * * *

(Title Omitted)
No. 71-1773
Court of Appeals
(Fifth Circuit)

ORDER

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

BY THE COURT:

This matter arises out of the complaint of the Louisiana Power & Light Company (LPL) against United Gas Pipe Line Company (United), a wholly-owned subsidiary of Pennzoil United, Inc., alleging that United breached its contract with LPL for the supply of natural gas to LPL's electrical generating plants at Sterlington and Nine Mile Point in Louisiana. The Federal Power Commission intervened. On April 27, 1971, the district court, having considered only the complaint and brief of LPL, granted a temporary restraining order prohibiting United from violating its contract curtailing its supply of gas to LPL. The order set a hearing on the preliminary injunction for May 11, 1971. United and the Federal Power Commission thereupon moved to dissolve the temporary restraining order and to dismiss the complaint for the following reasons:

"(1) The complaint fails to state a claim upon which relief can be granted.

(2) The Court lacks jurisdiction over the subject matter, exclusive jurisdiction being vested in the Federal Power Commission under and by virtue of the Natural Gas Act (15 USCA § 717 et seq.)

(3) Because this is a collateral attack upon proceedings now in progress before the Federal Power Commission, to which proceedings Plaintiff is a party, and Plaintiff has failed to exhaust its administrative remedies under the Natural Gas Act."

On April 29, 1971, the district court, without a hearing but after having received briefs from the parties and the intervenor, granted leave to the Federal Power Commission to intervene, dissolved the temporary restraining

order, and dismissed the suit for lack of jurisdiction. LPL filed a notice of appeal.

On Saturday morning, May 1, 1971, LPL moved for leave to file writs of mandamus and certiorari and, alternatively, for an expedited appeal. LPL also moved for an injunction pending appeal. These matters were presented ex parte to a single judge (Wisdom, J.). In the interest of judiciary economy, he treated these motions as one matter, as this panel does, calling for a stay of the district court's order dismissing the complaint and dissolving the temporary restraining order. Shortly after noon on Saturday, Judge Wisdom declined to pass upon the merits of the motions but issued a stay, subject to further orders of this Court, until a panel could be convened and conduct a hearing on the merits of LPL's motions. See Rule 8(a) of the Federal Rules of Appellate Procedure and Rule 10(b)(11), Local Rules of the United States Court of Appeals for the Fifth Circuit.

On May 5, 1971, a panel of this Court, consisting of the undersigned judges, conducted a hearing at which counsel for the Federal Power Commission, United, and LPL were present and given an opportunity to argue the case at length. The Court has now had an opportunity to consider the briefs, affidavits, and other papers presented at that hearing and subsequent to the hearing.

We note, first, taking an over-simplified view of the case, that the district court had before it as the basis for its decision only the original and amended complaints, the allegations of which must be accepted as true for purposes of a motion to dismiss. According to these allegations, the contract simply involved the direct sale of gas for use or consumption by the purchaser. And such sales are not within the jurisdiction of the Federal Power Commission. The construction of the contract therefore was for the court and United's curtailment of gas deliveries to LPL's plants was a breach of contract, a question within the district court's jurisdiction.

The case, however, is not that simple. It is evident to the Court that there are many disputed issues of fact and mixed issues of fact and law bearing upon a proper interpretation of the contract and a proper construction of the Natural Gas Act, 15 U.S.C. § 717, et seq. Indeed, counsel for the parties argue as if this Court had before it a transcript of testimony and the district court's findings of

fact and conclusions of law. We have concluded therefore that this is the type of case that requires the district court to take jurisdiction for the purpose of determining if it has jurisdiction. With this end in view the district court is directed to hold a full hearing at which the parties may present evidence bearing upon the jurisdictional issue.

The case is important. LPL contends that curtailment of gas deliveries will have a serious detrimental effect on its customers during its peak season, the summer months. United contends that this is a fight about who gets natural gas when there is not enough to go around; that is a matter peculiarly within the province of the Federal Power Commission. The Commission agrees with United and asserts that an adverse decision in this case will have a severe and detrimental impact upon the natural gas industry and the public which it serves. At this time the Commission is conducting curtailment proceedings to which the LPL is a party.

It Is Therefore Ordered:

1. Judge Wisdom's order vacating the district court's judgment of dismissal is reaffirmed as the order of this Court.

2. The case is remanded to the district court for an expedited hearing on the jurisdictional issue and on such other preliminary issues as may properly be raised. This Court expresses no opinion on the jurisdictional issue. At such hearing counsel for the parties and the intervenor may present evidence bearing on the jurisdiction of the court and on other appropriate preliminary questions. The district court will make appropriate findings of fact and state its conclusions of law.

3. Should the district court decide that it has jurisdiction, it will expedite the hearing on the merits. An appeal, if any, will be expedited.

4. This Court continues the stay issued by Judge Wisdom pending the hearing and judgment of the district Court.

Filed
May 14, 1971
Edward W. Wadsworth, Clerk

Filed
May 17, 1971
Alton L. Curtis, Clerk

* * * * *

CERTIFICATE:

I, P. E. Grimm, in my capacity as Assistant Regional Manager of Texaco Inc., Producing Department, Southeast Region, have custody of the records of the Gas Department, which include Gas Sales and Purchase Contracts and all related and other agreements, and I hereby certify that this is a true copy of certain provisions of that certain Gas Sales and Purchase Contract dated May 7, 1968 between Texaco Inc. and Louisiana Power and Light Company, specifically, the Preamble and Articles I, II, III and V.

/s/ P. E. Grimm
P. E. GRIMM

Sworn to and subscribed before me on this 28th day of May, 1971.

/s/ Clement R. Thome, Jr.
Notary Public

Gas Sales and Purchase Contract

This Agreement made and entered into this 7th day of May, 1968 by and between TEXACO INC., a corporation of the State of Delaware, herein represented by A. F. Higgins, Jr., its Attorney-in-Fact, hereinafter referred to as "Seller," and LOUISIANA POWER & LIGHT COMPANY, a corporation of the State of Florida, herein represented by E. A. Rodrigue, its Senior Vice President, hereinafter referred to as "Buyer."

Witnesseth:

That Whereas, Seller desires to sell and deliver to Buyer, and Buyer desires to purchase and receive from Seller natural gas needed to supply sixty-six and two-thirds percent (66⅔%) of the fuel energy requirements for the operation of Buyer's Nine-Mile Point Steam-Electric Generating Station, as hereinafter more fully defined under and in accordance with the terms and provisions hereinafter set forth:

Now, Therefore, in consideration of the premises and of the mutual benefits, covenants and agreements herein contained, the parties hereto, Seller and Buyer, have agreed and do hereby agree as follows:

Article I

Definitions

(1) The term "Day" means a period of twenty-four (24) consecutive hours beginning and ending at eight o'clock in the morning, local time. The reference date for any day shall be the date of the beginning of such day.

(2) The term "Month" means the period beginning at eight o'clock in the morning, local time, on the first day of a calendar month and ending at eight o'clock in the morning, local time, on the first day of the next succeeding calendar month.

(3) The term "Contract Year" shall mean a period of twelve consecutive months beginning at eight o'clock a.m., local time, on January 1, 1971 or eight o'clock a.m., local time, on the first day of the first month following the month in which Commercial Operations of Buyer's new 750 megawatt steam-electric generating unit are commenced, which-

ever date occurs first, and at eight o'clock local time on each anniversary of said date. It is further provided that if Commercial Operations of Buyer's new 750 megawatt steam-electric generating unit as referred to in Article I (5) hereof are commenced prior to January 1, 1971, then the first Contract Year shall include the period of time commencing with the date of commencement of Commercial Operations of Buyer's new 750 megawatt electric generating unit to the first day of the following month and the succeeding twelve months.

(4) "Commercial Operations," as used herein, shall mean the date on which the new 750 megawatt steam-electric generating unit, as hereinafter defined, is accepted by the Middle South System Operator for dispatching as part of the Middle South generating capability and is the same date that this aforesaid unit is included as part of the generating capability of Buyer's Nine-Mile Point Electric Generating Station for the purpose of determining Capacity Equalization Payments due under the intercompany agreement.

(5) The words "Nine-Mile Point Electric Generating Station" referred to hereinbefore and hereinafter shall mean Buyer's three present steam-electric generating units which have a generating capacity of seventy-four (74), one hundred and seven (107), and one hundred and thirty-five (135) megawatts, and Buyer's new seven hundred and fifty (750) megawatt steam-electric generating unit, which said new unit is currently being installed and scheduled for completion on or before January 1, 1971 at the Nine-Mile Point Electric Generating Station, or as many of the aforesaid units as may be in operation from time to time during the term of this contract, all of which units are, or shall be located in Sections 5 and 6, Township 13 South, Range 23 East, Jefferson Parish, Louisiana, as provided for herein.

(6) The word "gas" shall mean natural gas produced from either gas wells or oil wells.

(7) The letters "MCF" shall mean one thousand cubic feet.

(8) The term "British Thermal Unit" or "BTU" shall mean the amount of heat required to raise the temperature of one (1) pound of water one degree (1°) Fahrenheit at sixty degrees (60°) Fahrenheit.

(9) The term "total heating value" shall mean the gross

number of British Thermal Units, sometimes hereinafter referred to as BTU, produced by the combustion at constant pressure, of the amount of gas, saturated with water vapor, which would occupy a volume of one (1) cubic foot at a temperature of sixty degrees (60°) Fahrenheit, and under a pressure equivalent to that of thirty (30) inches of mercury at thirty-two degrees (32°) Fahrenheit and under the standard gravitational force (acceleration 980.665 cm. per sec. per sec.), with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas in air, and when the water formed by combustion is condensed to the liquid state, corrected to a water-vapor-free basis and expressed at a pressure base of 15.025 psia.

(10) The term "fuel energy requirements" shall mean the fuel energy, as determined by the total heating value contained in the quantity of all natural gas, fuel oil, coal and any other type of fuel substance, which can be utilized or is needed by Buyer from time to time during the term hereof for the operation of Buyer's Nine-Mile Point Electric Generating Station. Commencing with the date of Commercial Operations and continuing during the term hereof, Seller will be obligated to make available to Buyer and Buyer will be obligated to purchase, at the point of delivery provided for herein, gas to supply sixty-six and two thirds per cent (66⅔%) of the fuel energy requirements, as defined herein, of Buyer at its Nine-Mile Point Electric Generating Station, but not in excess of the maximum quantities set forth in Article III herein.

Article II

Source of Gas

1.(a) Seller shall have the right or option at its election from time to time to deliver gas from fields, or other sources, at the delivery point as provided herein; connecting at its option, from time to time, such fields or other sources of supply.

(b) It is the intent of the parties hereto that no particular field, nor particular gas reserves, are committed to the performance of this contract.

Article III

Sale of Gas

1.(a) Subject to and in accordance with the terms, conditions and limitations set forth in this Article III, Seller will make available for delivery to Buyer at its said Nine-Mile Point Electric Generating Station, the following volume of gas per Contract Year and Buyer agrees to purchase and take from Seller at the delivery point hereinafter provided for, gas to the extent necessary to supply sixty-six and two-thirds per cent (66⅔%) of Buyer's fuel energy requirements for the said Nine-Mile Point Electric Generating Station up to and not to exceed the following volume of gas per Contract Year:

(i) For the first ten (10) Contract Years beginning from the date of commencement of Commercial Operations of Buyer's new 750 megawatt steam-electric generating unit as defined in Article I (5) hereof, or January 1, 1971, whichever date occurs first, that volume of gas which contains forty-three (43) trillion British Thermal Units per Contract Years.

(ii) For the five (5) Contract Years next succeeding the period set forth in sub-paragraph (i) of this Paragraph 1(a), Article III, that volume of gas which contains thirty-seven (37) trillion British Thermal Units per Contract Year, and

(iii) For the five (5) Contract Years next succeeding the period set forth in sub-paragraph (ii) of this paragraph 1(a); Article III, that volume of gas which contains twenty-eight (28) trillion British Thermal Units per Contract Year.

(b) Buyer shall purchase and take from Seller, or pay Seller for, whether taken or not, the following minimum volume of gas per Contract Year:

(i) For the first ten (10) Contract Years beginning from the date of commencement of Commercial Operations of Buyer's new 750 megawatt steam-electric generating unit as defined in Article I (5) hereof, or January 1, 1971, whichever date occurs first, that volume of gas which contains twenty-one and five-tenths (21.5) trillion British Thermal Units per Contract Year, or an annual minimum volume of gas which contains that amount of

British Thermal Units equal to sixty-six and two-thirds per cent of Buyer's annual fuel energy requirements for the said Nine-Mile Point Electric Generating Station, whichever volume of gas is the greater.

(ii) For the five (5) Contract Years next succeeding the period set forth in subparagraph (i) of this Paragraph 1(b), Article III, that volume of gas which contains eighteen and five-tenths (18.5) trillion British Thermal Units per Contract Year, or an annual minimum volume of gas which contains that amount of British Thermal Units equal to sixty-six and two-thirds per cent (66⅔%) of Buyer's annual fuel energy requirements for the said Nine-Mile Point Electric Generating Station, whichever volume of gas is the greater, and

(iii) For the five (5) Contract Years next succeeding the period set forth in subparagraph (ii) of this Paragraph 1(b), Article III, that volume of gas which contains fourteen (14) trillion British Thermal Units per Contract Year, or an annual minimum volume of gas which contains that amount of British Thermal Units equal to sixty-six and two-thirds per cent (66⅔%) of Buyer's annual fuel energy requirements for the said Nine-Mile Point Electric Generating Station, whichever volume of gas is the greater.

It shall be conclusively presumed for the purposes of this Article III, sub-paragraph 1(b), that the gas which Buyer is obligated to pay for, although not taken as provided for hereinabove, would have met the contract specifications and BTU content. Subject to the terms and provisions of Article IV (1), if by reason of Force Majeure, as defined herein, Seller is unable to deliver gas to Buyer, or Buyer is by reason of Force Majeure unable to purchase and take delivery of gas hereunder on any day or days during the Contract Year, then the respective annual minimum quantities for which Buyer is obligated to pay for shall be reduced to the extent that the day or days (any portion of a day counting a full day) during which deliveries are suspended bears to the total number of days in the Contract Year.

Since it will not be practical for Buyer to determine precisely its energy fuel requirements in advance, it is agreed that at the close of each month Buyer shall report to Seller in writing the total energy fuel requirements at

its Nine-Mile Point Electric Generating Station during the previous month. If any such report indicates that the quantities of gas delivered to Buyer by Seller during a particular month were less than the quantities of gas which Buyer was obligated to purchase hereunder from Seller, then Buyer shall use its best efforts to take from Seller during the following month, in addition to the quantities of gas which Buyer is obligated to take, an additional quantity of gas which will offset such deficiency in take which occurred in the previous month.

(c) It is understood and agreed by Buyer and Seller that if during the term hereof Buyer actually takes delivery of gas less than the specific stated minimum quantities recited in sub-paragraph (i), (ii), and (iii) of paragraph 1(b) of this Article III, Buyer shall not have the right to offset such deficiencies against its takes during the next succeeding contract year; it being the intent hereof that Buyer shall not have the right to offset any deficiencies which are less than said stated quantities whether such stated quantities are more, or, less than sixty-six and two-thirds per cent ($66\frac{2}{3}\%$) of Buyer's fuel energy requirements for a particular contract year. However, subject to the other provisions of this paragraph, if during any contract year, Buyer actually takes delivery of gas less than the annual minimum quantity of sixty-six and two-thirds per cent ($66\frac{2}{3}\%$) of Buyer's fuel energy requirements for such contract year, provided said annual minimum quantity is not less than the stated minimum quantities previously referred to herein which it is required to pay for, Buyer shall have the right to offset such deficiency against Buyer's take during the next succeeding contract year by taking and purchasing from Seller a quantity of gas equal to said deficiency, in addition to the aforesaid annual minimum quantity Buyer is obligated to take during said year, without again paying therefor, and provided further Buyer shall pay Seller for any differential in price between that upon which payments were made and that applicable at the time of the taking.

Seller shall, under no circumstances be required to deliver gas to Buyer in excess of the maximum quantities applicable hereunder.

(d) It is further understood and agreed by Buyer and Seller that in the event Buyer actually takes delivery of

gas in any contract year in excess of sixty-six and two-thirds per cent (66⅔%) of Buyer's fuel energy requirements for a particular contract year, and provided said sixty-six and two-thirds per cent (66⅔%) of Buyer's fuel energy requirements exceeds the specific stated quantities recited in sub-paragraph (i), (ii) and (iii) of paragraph 1(b) of this Article III, and which gas is not being utilized to offset any previous deficiency in take, then Buyer shall have the right to offset such excess quantity of gas taken from Seller against any deficiencies which may occur in the following contract year.

2. Seller shall make available for delivery hereunder, and deliver to Buyer when requested, the following maximum volumes of gas:

(i) For the first ten (10) Contract Years beginning from the date of commencement of Commercial Operations of Buyer's new 750 megawatt steam-electric generating unit as defined in Article (I) (5) hereof, or January 1, 1971, whichever date occurs first, that hourly maximum volume of gas which contains seven and one-tenth (7.1) billion British Thermal Units provided that the daily take of Buyer does not exceed one hundred and forty-two (142) billion British Thermal Units.

(ii) For the five (5) contract years next succeeding the period set forth in sub-paragraph (i) of this Paragraph 2, that hourly maximum volume of gas which contains seven and one-tenth (7.1) billion British Thermal Units provided that the daily take of Buyer does not exceed one hundred and twenty-three (123) billion British Thermal Units.

(iii) For the five (5) Contract Years next succeeding the period set forth in sub-paragraph (ii) of this Paragraph 2, that hourly maximum volume of gas which contains seven and one-tenth (7.1) billion British Thermal Units provided that the daily take of Buyer does not exceed one hundred and six (106) billion British Thermal Units.

3. In the event that one or more of the aforesaid steam-electric generating units which are or shall be located at said Nine-Mile Point Station are placed on standby status, or permanently abandoned, then the quantities set forth in sub-paragraph 1(a) and paragraph 2 of this Article III, above, shall be reduced by the average quantity fuel energy

requirements used yearly, hourly, and daily in such unit or units during the preceding six contract years. In addition, the stated annual minimum quantity provided in subparagraph 1(b) above shall be reduced proportionately with the reduction of the annual maximum quantity provided in sub-paragraph 1(a) above. If any unit placed on standby basis should be subsequently returned to service, then the aforesaid quantities shall be increased by the same amounts during the time when such unit is in service.

4. Buyer shall notify Seller, through its duly authorized representative, in writing or by telegram, or orally in person, or by telephone, at Seller's expense, if any, of changes in fuel requirements of Buyer hereunder.

Further, if Seller is required to make gas nominations to the present, or successor, regulatory body, or bodies, of the State of Louisiana, Buyer shall furnish Seller with the estimate of its fuel requirements for the period in which such nomination is required.

ARTICLE V

Term

This contract shall become fully effective and binding upon execution hereof and shall continue in full force and effect for a period of twenty years, from the first day of the month following the month in which Commercial Operations are commenced for the aforesaid 750 megawatt steam-electric generating unit or January 1, 1971, whichever date occurs first, unless otherwise terminated in accordance with the provisions herein set forth in this contract.

Filed
June 11, 1971

* * * * *

CERTIFICATE

I, P. E. Grimm, in my capacity as Assistant Regional Manager of Texaco, Inc., Producing Department, Southeast Region, have custody of the records of the Gas Department, which include Gas Sales and Purchase Contracts and all related and other agreements, and I hereby certify that this is a true copy of certain provisions of that certain Gas Sales and Purchase Contract dated May 22, 1970 between

Texaco Inc. and Louisiana Power & Light Company, specifically, the Preamble and Articles I, II, III and V.

/s/ P. E. Grimm
P. E. Grimm

Sworn to and subscribed before me on this 28th day of May, 1971.

/s/ Clement R. Thome
Notary Public

* * * * *

Gas Sales and Purchase Contract

This Agreement made and entered into this 22nd day of May, 1970, by and between TEXACO, INC., a corporation of the State of Delaware, herein represented by P. E. Grimm, its Attorney-in-Fact, hereinafter referred to as "Seller," and LOUISIANA POWER & LIGHT COMPANY, a corporation of the State of Florida, herein represented by E. A. Rodrigue, its President, hereinafter referred to as "Buyer."

Witnesseth:

Whereas, under date of May 7, 1968, Texaco, Inc., as Seller, and Louisiana Power & Light Company, as Buyer entered into a certain contract to purchase and receive from Seller natural gas to supply sixty-six and two-thirds per cent (66⅔%) of the fuel energy requirements in the operation of Buyer's Nine Mile Point Electric Generating Station, as therein defined, located in Section 5 and 6, Township 13 South, Range 23 East, Jefferson Parish, Louisiana; and

Whereas, Buyer represents that a second new steam-electric generating unit having a generating capacity of 750 megawatts (hereinafter referred to as Fifth Unit) will be installed at said Nine Mile Point Electric Generating Station and is scheduled for operation on or before January 1, 1973; and

Whereas, Seller desires to sell and deliver to Buyer, and Buyer desires to purchase and receive from Seller natural gas to supply the total fuel energy requirements in the operation of Buyer's said Fifth Unit, as more fully defined subsequently herein and in accordance with the terms and provisions hereinafter set forth:

Now, Therefore, in consideration of the premises and of the mutual benefits, covenants and agreements herein contained, the parties hereto, Seller and Buyer, have agreed and do hereby agree as follows:

ARTICLE I

Definitions

(1) The term "Day" means a period of twenty-four (24) consecutive hours beginning and ending at eight o'clock a.m., local time. The reference date for any day shall be the date of the beginning of such day.

(2) The term "Month" means the period beginning at eight o'clock a.m., local time, on the first day of a calendar month and ending at eight o'clock a.m., local time, on the first day of the next succeeding calendar month.

(3) The term "Contract Year" shall mean a period of twelve consecutive months beginning at eight o'clock a.m., local time, on January 1, 1973 or eight o'clock a.m., local time, on the first day of the first month following the month in which Commercial Operations of Buyer's Fifth Unit are commenced, whichever date occurs first, and at eight o'clock a.m., local time, on each anniversary of said date. It is further provided that if Commercial Operations of Buyer's Fifth Unit as defined in Article I (5) hereof are commenced prior to January 1, 1973, then the first Contract Year shall include the period of time commencing with the date of commencement of Commercial Operations of Buyer's Fifth Unit to the first day of the following month and the succeeding twelve months.

(4) "Commercial Operations", as used herein, shall commence on the date on which the Fifth Unit, as hereinafter defined, is accepted by the Middle South System Operator for dispatching as part of the Middle South generating capability and is the same date that this aforesaid unit is included as part of the generating capability of Buyer's Nine-Mile Point Electric Generating Station for the purpose of determining Capacity Equalization Payments due under the intercompany agreement.

(5) The words "Fifth Unit" referred to hereinbefore, and hereinafter, shall mean Buyer's second new seven hundred and fifty (750) megawatt steam-electric generating unit, which said second new unit will be installed and scheduled for completion on or about January 1, 1978 at Buyer's Nine Mile Point Electric Generating Station.

(6) The word "gas" shall mean natural gas produced from either gas wells or oil wells.

(7) The letters "MCF" shall mean one thousand cubic feet.

(8) The term "British Thermal Unit" or "BTU" shall mean the amount of heat required to raise the temperature of one (1) pound of water one degree (1°) Fahrenheit at sixty degrees (60°) Fahrenheit.

(9) The term "total heating value" shall mean the gross number of British Thermal Units, sometimes hereinafter referred to as BTU, produced by the combustion at constant pressure, of the amount of gas, saturated with water vapor, which would occupy a volume of one (1) cubic foot at a temperature of sixty degrees (60°) Fahrenheit, and under a pressure equivalent to that of thirty (30) inches of mercury at thirty-two degrees (32°) Fahrenheit and under the standard gravitation force (acceleration 980.665 cm. per sec.) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas in air, and when the water formed by combustion is condensed to the liquid state, corrected to a water-vapor-free basis and expressed at a pressure base of 15.025 psia.

(10) The term "fuel energy requirements" shall mean the fuel energy, as determined by the total heating value contained in the quantity of all natural gas, fuel oil, coal and any other type of fuel substance, which can be utilized or is needed by Buyer from time to time during the term hereof for the operation of Buyer's Fifth Unit, but not in excess of the maximum quantities set forth in Article III herein. Commencing with the date of Commercial Operations and continuing during the term hereof, Seller will be obligated to make available to Buyer and Buyer will be obligated to purchase, at the point of delivery provided for herein, gas to supply the fuel energy requirements as defined herein, needed for the operation of Buyer's Fifth Unit, but not in excess of the maximum quantities set forth in Article III herein.

In the event during the term hereof the fuel energy requirements, as defined herein, needed for the operation of Buyer's Fifth Unit should be in excess of the maximum quantities of natural gas set forth in Article III herein, and if Seller and Buyer are unable to reach an agreement

covering the sale and purchase of gas in excess of such maximum quantities, then Buyer shall have the right to use any type of alternate fuel that may be available to satisfy the fuel energy requirements needed for the operation of Buyer's Fifth Unit which are in excess of the maximum quantities of gas set forth in Arfiele III herein. However, it is clearly understood by the parties hereto that nothing contained in this paragraph shall obligate either party to negotiate for the sale and purchase of natural gas needed or required for the fuel energy requirements of Buyer in the operation of Buyer's Fifth Unit which are in excess of the maximum quantities of natural gas set forth in this contract.

ARTICLE II

Sources of Gas

1.(a) Seller shall have the right or option at its election from time to time to deliver gas from fields, or other sources, at the delivery point as provided herein, connecting or disconnecting at its option, from time to time, such fields or other sources of supply.

(b) It is the intent of the parties hereto that no particular field, nor particular gas reserves, are committed to the performance of this contract.

ARTICLE III

Sale of Gas

1. (a) Subject to and in accordance with the terms, conditions and limitations set forth in this Article III, Seller will make available for delivery to Buyer at the point of delivery provided for herein, the following volume of gas per Contract Year and Buyer agrees to purchase, pay for, and take from Seller at the delivery point hereinafter provided for, gas to the extent necessary to supply Buyer's entire and total fuel energy requirements for Buyer's Fifth Unit up to and not to exceed the following volume of gas per Contract Year:

(i) For the first consecutive five (5) Contract Years, that volume of gas which contains forty-six (46) trillion British Thermal Units per Contract Year.

(ii) For the five (5) consecutive Contract Years next

succeeding the period set forth in subparagraph (i) of this paragraph 1(a), Article III, that volume of gas which contains forty-two (42) trillion British Thermal Units per Contract Year.

(iii) For the five (5) consecutive Contract Years next succeeding the period set forth in subparagraph (ii) of this Paragraph 1(a), Article III, that volume of gas which contains thirty-eight (38) trillion British Thermal Units per Contract Year, and

(iv) For the five (5) consecutive Contract Years next succeeding the period set forth in subparagraph (iii) of this Paragraph 1(a), Article III, that volume of gas which contains thirty (30) trillion British Thermal Units per Contract Year.

(b) Buyer shall purchase, and take from Seller, or pay Seller for, whether taken or not, the following minimum volume of gas per Contract Year:

(i) For the first five (5) consecutive Contract Years, that volume of gas which contains twenty-nine (29) trillion British Thermal Units per Contract Year.

(ii) For the five (5) consecutive Contract Years next succeeding the period set forth in subparagraph (i) of this Paragraph 1 (b), Article III, that volume of gas which contains twenty-four (24) trillion British Thermal Units per Contract Year.

(iii) For the five (5) consecutive Contract Years next succeeding the period set forth in subparagraph (ii) of the Paragraph 1 (b), Article III, that volume of gas which contains twenty-four (24) trillion British Thermal Units per Contract Year, and

(iv) For the five (5) consecutive Contract Years next succeeding the period set forth in subparagraph (iii) of this Paragraph 1 (b), Article III, that volume of gas which contains eighteen (18) trillion British Thermal Units per Contract Year.

It shall be conclusively presumed for the purposes of this Article III, Paragraph 1 (b), that the gas which Buyer is obligated to pay for, although not taken as provided for hereinabove, would have met the contract specifications and BTU content. Subject to the terms and provisions of Article IV (1), if by reason of Force Majeure, as defined herein, Seller is unable to deliver gas to Buyer, or Buyer

is by reason of Force Majeure unable to purchase and take delivery of gas hereunder on any day or days during any Contract Year, then the respective annual minimum quantities for which Buyer is obligated to pay for shall be reduced to the extent that the day or days (any portion of a day counting as a full day) during which deliveries are suspended bears to the total number of days in the Contract Year. It is further provided, however, that the quantities of gas, if any, delivered and received on any day or days governed wholly or in part by Force Majeure shall not be considered in determining whether or not Buyer has complied with its obligation to purchase the annual minimum quantity during any Contract Year.

(c) It is understood and agreed by Buyer and Seller that if during the term hereof Buyer actually takes delivery of gas less than the stated minimum quantities recited in sub-paragraphs (i), (ii), (iii), and (iv) of Paragraph 1 (b) of this Article III, subject to the other provisions of this paragraph, Buyer shall have the right to offset such deficiency against Buyer's take during the next succeeding contract year by taking and purchasing from Seller a quantity of gas equal to such deficiency, in addition to the aforesaid annual minimum quantity Buyer is obligated to take during such year, without again paying therefor, and provided further Buyer shall pay Seller for any differential in price between that upon which payments were made and that applicable at the time of the taking.

Seller shall, under no circumstances be required to deliver gas to Buyer in excess of the maximum quantities applicable hereunder.

2. Seller shall make available for delivery hereunder, and deliver to Buyer when requested, the following maximum volumes of gas:

(i) For the first ten (10) consecutive Contract Years, that hourly maximum volume of gas which contains seven and one-tenth (7.1) billion British Thermal Units provided that the daily take of Buyer does not exceed one hundred and forty-two (142) billion British Thermal Units.

(ii) For the ten (10) consecutive Contract Years next succeeding the period set forth in subparagraph (i) of this Paragraph 2, that hourly maximum volume of gas which contains seven and one-tenth (7.1) billion British

Thermal Units provided that the daily take of Buyer does not exceed one hundred and twenty-eight (128) billion British Thermal Units.

3. Buyer shall give Seller as much notice as reasonably practicable through its duly authorized representative, in writing or by telegram, or orally in person, or by telephone, at Seller's expense, if any, of any changes in fuel requirements of Buyer hereunder. Further, if Seller is required to make gas nominations to the present, or successor, regulatory body, or bodies, of the State of Louisiana, Buyer shall furnish Seller with the estimate of its fuel energy requirements for the period in which such nomination is required.

Article V

Term

This contract shall become fully effective and binding upon execution hereof and shall continue in full force and effect for a period of twenty (20) Contract Years, unless otherwise terminated in accordance with the provisions herein set forth in the contract.

Transcript of Proceedings before the District Court

[caption omitted]

Proceedings had at Alexandria, Louisiana, before the Honorable Nauman S. Scott, United States District Judge, Western District of Louisiana, on May 27, A. D. 1971 beginning at 2:15 P. M.

[appearances omitted]

PROCEEDINGS:

THE COURT: Mr. Harvin, you are the mover so you may proceed.

MR. HARVIN: We didn't have much of an opportunity to get very far on leafing through these, Your Honor, but if you will give us just one more minute, I think I will be in a position to at least get copies to everyone.

THE COURT: That is all right.

MR. HARVIN: May it please Your Honor, I think that I can put in the record and give Your Honor some field for almost all of the exhibits that United will want to offer today. I may have to call upon one witness to give an explanation in connection with a couple of them but I will put that off until we can get through as much of it as I can.

THE COURT: All right, sir.

MR. HARVIN: Basically, the evidence that we are proposing to offer here is documentary in nature. It consists of records from the Federal Power Commission Proceedings which is variously referred to as RP71-29 or the curtailment proceeding first, and then when that one has been concluded, Federal Power CP71-89 which is the certificate proceeding in which the application has been made for the Commission to issue these certificates of convience and necessity for the service to the New Orleans area and we are offering these records in connection with the jurisdictional issue that is before the Court to demonstrate that the matters which are here at issue in this lawsuit are presently before the Federal Power Commission with these very pardons before the Federal Power Commission and at such time as is appropriate during the hearings, we will offer authorities to Your Honor that this is not only a

matter of the Commission's primary jurisdiction over these matters, but under the authorities that the Commission has the prerogative to hear and determine whatever necessary factual issues there are to decide its own jurisdiction in the first instance rather than having a separate court in what amounts to a collateral attack of doing so. All of the documentary evidence and the live testimony, too, that will be before Your Honor, will really be presented against the background of the serious crisis which has arisen in the national natural gas industry. The declining reserves through the country on the one hand and the increase of consumption on the other, I am not going to introduce evidence about this at this time, and in the interest of time, because these are matters of common knowledge which have been judicially noticed by the Fifth Circuit as recently as last year in 428 F.2d 407, which is commonly known as the Southern Louisianan Area Rate Cases. The curtailment proceeding, 71-29, was filed by United on October 26, 1970 and the first exhibit that we have to offer is United's petition for declaratory order before the Federal Power Commission on that date and what that petition does as is indicated on the second page, mid-way in the paragraph headed Roman numeral II, where I quote "It now appears that during the 1970, 1971 winter season, United will be obliged to curtail deliveries because of the national gas shortage and this curtailment will require implementation of section 12 of its tariff on a broad scale for extended periods of time. Commencing last summer, United informed its customers of the possibility of this curtailment and in recent weeks has informed each customer of United's specific plan to implement curtailment based on the best information currently available, including specific projected curtailment volumes for the individual customers for the first three months of the winter season." Over in the following paragraph, the point is made that the possibility of curtailment arises not from any shortage of any pipeline capacity but from a temporary shortage of field gas supply and that the impossibility of getting enough spot gas to supplement the needs, would require the curtailment program to be made effective on November 1, 1970, the first day of the winter season and the petition proceeds to deal with the national shortage, the steps that the Commission and awareness of the steps

that the Commission is taking to alleviate this and then sets out the order of curtailment on page four, paragraph four and the order of curtailment which becomes part of the bone of contention between the parties to this lawsuit arises in this way.

The first customers to suffer curtailment are industrial customers and gas used for industrial purposes including gas to generate the electricity which is used for industrial purposes, this is the first category of service that is recited here in the petition which will be affected. The petition points out that only industrial uses will be affected. We are not talking about curtailment of domestic consumption, it is industry that will have to be curtailed and it has attached to it, as Your Honor will see, numerous statistical pages setting forth information as to the take or consumption that has been involved and the amount expected to be curtailed, based upon the projections.

The next step in that proceeding was that on November 3, 1970, the Commission issued its notice of the filing of this petition for a declaratory order relating to the implementation of this curtailment program and we are offering that as the next exhibit. That is in effect, Your Honor, what—a notice that is served upon the customers and by that means they are made aware of the proceedings and given the opportunity, if appropriate, to intervene.

The next step in the development of this proceeding that we want to bring to Your Honor's attention as the third exhibit is the petition to intervene in behalf of Louisiana Power and Light Company. Now this petition, to intervene, is significant to this proceeding for the reason that it recites that LP&L has contracts with United for its supply of natural gas to the Sterlington Plant and to the Nine Mile Point Station in the New Orleans area. Those are precisely the contracts or the sales that are at issue in this lawsuit. Recited in the petition to intervene, we call to Your Honor's attention, from both the Sterlington contract and the Nine Mile Point contract for what are called the impairment of deliveries clauses from those contracts and the essential contention that is made, both in this petition to intervene before the Federal Power Commission and also in this lawsuit that is before the Court is that the curtailment plan violates the impairment of deliveries clauses in the contract for Sterlington and the Nine Mile Station.

Also raised by LP&L in the petition to intervene is the same contention that it makes here, that the Commission does not have jurisdiction over these sales because they constitute direct sales which are exempt under section one, one B, of the natural gas act. It is rather significant, I think and I would like to call to Your Honor's attention on the fourth page of the petition to intervene, at the bottom of the page, the paragraph headed Roman numeral IX, the last full sentence, however there may be certain jurisdictional aspects of United's curtailment program which could have a direct effect on LP&L which LP&L was stating is the reason why it should be allowed to intervene in this proceeding.

Now, the next step in the curtailment proceeding before the Commission and the fourth exhibit is the Commission's order providing for a hearing on the petition and on an amended petition which has been filed does not relate to the controversy between these parties but with another customer of United's, this order establishing the procedures for this curtailment hearing and permitting the intervention of the parties who are listed in the order, one of whom is Louisiana Power and Light. The order recites on page three that the urgency for the resolution of the questions presented by United's original and amended petition and the answers and motions in opposition thereto are clear. The 1970-1971 winter heating season has begun and United has stated that it is already put its curtailment program into effect under such circumstances as is appropriate. We order the holding of a prompt hearing in this matter in which United will present its evidence orally, subject to cross-examination and so on.

The hearing of live testimony, according to the record then began on December 21, 1970 and at that point, there was, on December the 22nd, there was a settlement proposal made in connection with the winter curtailment program and the portion of the transcript of that testimony, which states the essence of the settlement proposal is offered as the fifth exhibit. That settlement proposal was offered by all parties, save one, for these purposes we want to show, from the sixth exhibit that it was approved by Louisiana Power and Light Company, acting through its attorney in the Federal Power Commission's proceedings, Richard M. Merriman and the settlement proceeding

was also approved by the order of the Commission which is the next exhibit, #7, on December 29, 1970.

The procedure was carried one step further by the Commission's examiner's order of January 5, 1971, that continued the curtailment proceeding before the Commission while the settlement was being implemented. The settlement involved an attempt to acquire additional spot gas, Your Honor, to take care of some of the needs of the customers but still on a curtailed basis.

Then the next step on the proceeding is a telegraphic communication of January 8, 1971, from United to all of the parties in RP71-29, as Your Honor will see from that exhibit. United has—advises that it has succeeded in obtaining commitments for some spot purchase gas. It states that it will continue to exert its efforts to enlarge upon that amount but it says this of significance, that I call to the Court's attention. The parties must realize however, that these purchases will not completely alleviate the shortage on United's system and thus United will still have to impose curtailments in the future.

The next step in the proceeding, the next exhibit is the motion of United Gas Pipeline Company to revise the schedule for filing testimony in this hearing and the point in it that I want to direct to the Court's attention to, is set forth in the very first sentence of the motion. As indicated in its telegraph of January 8, 1971, United intends to file an amendment to its petition in this proceeding to cover curtailments beginning April 1, 1971. This amendment and related direct testimony to be filed on February 22, 1971.

The next exhibit is the presiding examiner's ruling with respect to that motion to revise the schedule of this proceeding and ordering that United's direct testimony, relating to the amendment shall be filed by February 22, 1971. The supplemental petition of United for declaratory order with exhibits and testimony attached is the next exhibit. It was filed on February 22. It was apprenticed, as indicated in the first paragraph of the exhibit. That it is made necessary by the fact that United's field supplies of gas continued to be insufficient to meet the demands of United's customers and thus it is necessary that United's curtailment program be extended from April 1, 1971 at least through October 31, 1971.

The earlier petition, the Court will recall, was for the

winter months and this carries it on through the summer months through to the beginning of what, in the industry, they call the heating season. Again, it emphasizes that we are talking about curtailing only gas used for industrial purposes and gas used to generate electricity for industrial purposes and again it has a detailed set of exhibits as to estimated deliveries to customers as to past experience and what is to be expected with respect to the curtailment and it contains the direct testimony of Mr. M. T. Belvin, Jr. who was the witness whose deposition was taken by Louisiana Power and Light earlier this week.

Now, at this point in connection with the curtailment proceeding, I would like to call Mr. W. B. Cassin, who is the vice-president and general attorney for United, who has been in charge of United's work for that proceeding, Your Honor.

W. B. Cassin

Called as a witness by United Gas Pipeline Company and Pennzoil United Incorporated and having been first duly sworn, testified as follows:

Direct Examination

Mr. Harvin: With my announcement of Mr. Cassin's identity, may we dispense with the formalities?

The Court: Yes, sir.

By Mr. Harvin:

Q. Mr. Cassin, directing your attention to the curtailment proceedings before the Federal Power Commission, will you tell the Court approximately the number and give him some description of the nature of the business of the intervenors other than Louisiana Power and Light Company?

A. Yes, sir, there are a total of fifty intervenors. Seventeen are direct industrial customers of United Gas Pipeline Company, five are pipeline customers of United Gas Pipeline Company, six are what we call city gate customers or distributors within municipalities or customers of United Gas Pipeline and there are twenty-two whom I put in a miscellaneous category. They are not directly related to United Gas, Your Honor, but they are city gate customers of our pipeline such as Memphis Gas Light and

Waterworks; Laclede that serves St. Louis and others, including pipelines included in that twenty-two are pipeline company customers of ours and some even further down the road such as pipeline customers of our customers such as Consolidated Natural Gas, Columbia Gas System, Algonquins Gas, and major distributors in the east, and public service commissions, and public service commissions such as the New York Public Service Commission.

Q. Mr. Cassin, directing your attention for a moment to the original curtailment program as proposed by United in the original petition in the curtailment proceeding, that is, for the winter season.

A. Yes, sir.

Q. Will you tell the Court the purpose of that curtailment program?

A. Of the curtailment program?

Q. For the 1970 and 1971 winter season.

A. The program was made necessary because United did not have enough gas available to purchase from its field suppliers or in storage to meet the anticipated needs of United's customers in the heating season of 1970 and 1971.

Q. Was there any element of storage of gas involved in the 1970-71 winter curtailment program?

A. Yes, sir, there was.

Q. Tell us about that, please.

Mr. Carter: Excuse me just a moment, we would like to enter an objection and I had better state to the Court Reporter, this is Andrew P. Carter on behalf of Louisiana Power and Light Company. I believe we are going a little beyond the question of jurisdiction.

Mr. Harvin: This testimony is really being offered to try to give the Court as thorough an understanding as we can of just what has been involved in this proceeding before the Commission, rather than on the merits of those matters.

The Court: The objection is overruled, as long as the questions are related strictly to that, developing what those needs are.

The Witness: United has two storage fields; a smaller one in Jackson, Mississippi and a very large one in Bistineau in Northern Louisiana, and those fields hold a—however, a faineant quantity of gas. United found itself

unable to fill those fields last summer and United found itself in a position where it was projected that those fields would be completely drained fairly early in the winter season, in January, if the curtailment program were not effected in November and applied on a rateable basis, in order to conserve those storage supplies.

By Mr. Harvix:

Q. All right. Now, what part did the storage of gas play in the curtailment program announced in the supplemental petition that was filed in late February of this year, that is, the curtailment program beginning April 1st to run through the summer?

A. It played a very large part; as I said, United was unable to fill its storage fields in the summer of 1970, and as United entered the summer period of 1971, it found itself faced once again with the prospect of having the demands from its customers upon its field supplies, this summer, being so large that they would once again be unable to fill these storage fields. To give some numbers that are reflected in the proceedings at the Commission, the Jackson storage field holds approximately five million cubic feet of gas, the Bistineau storage field holds approximately ninety billion cubic feet. While we were able, pretty well, to fill the Jackson field, which is obviously the much lesser of the two fields, the Bistineau field was only filled to approximately sixty-five billion cubic feet, some twenty-five billion cubic feet below its capacity in 1970. We projected at the time of the supplemental program, the supplemental filing was made that we would not even reach that level in Bistineau this year and therefore, in order to assure that Bistineau was filled, a curtailment program was projected for the period of April through October of 1971.

Q. And will you tell the Court whether or not it is United's position, in the curtailment program, before the Commission that if the curtailment, or what United's position is on this point, if the curtailment program is not allowed or interfered with this summer, what will be the effect upon the coming heating season, beginning November 1.

Mr. Carter: Your Honor, may I just make my objection general to all of this?

THE COURT: Yes, sir, I think we are getting a little bit away from the juri-dictional and I think I will just specifically sustain that objection to the question.

BY MR. HARVIX:

Q. Then, Mr. Cassin, after the filing of the supplemental petition late in February, did the Commission commence a hearing upon the summer curtailment program?

A. Yes, sir, on March 31, a hearing commenced, in March 31, 1971, a hearing commenced before a presiding examiner of the Federal Power Commission at which all parties were allowed to cross examine United's witnesses with respect both to the winter curtailment program and the summer curtailment program and all testimony that had previously been filed and that hearing went on and filled two thousand and two hundred pages of transcript. It went on approximately four weeks and was an exhaustive hearing.

Q. Which I suppose, numerous technical exhibits attached to the transcript?

A. Yes, sir, the exhibits run in number at, some seventy and some many hundreds of pages in extent.

MR. HARVIX: May I inquire of the Commission's counsel here, Your Honor, if they have a set of the transcript of these hearings?

THE COURT: Yes, sir.

MR. GOOCH: Yes, Your Honor, we do.

MR. HARVIX: Would counsel please point it out to the Court?

MR. GOOCH: This stack covers the orders of the Commission, the exhibits filed and the testimony received in the curtailment case.

MR. HARVIX: We don't really want to clutter the record, Your Honor, by attempting to put that entire twenty-two hundred pages in there but if there is any inquiry about any of it or if there is any reference to be made to it, we are perfectly willing for it to be offered.

BY MR. HARVIX:

Q. Mr. Cassin, is it correct that the record in this lawsuit will reflect that it was filed on March 31, 1971, the same day that this hearing began before the Federal Power Commission?

A. Yes, sir, that is correct.

Q. Now; you said, I think, that that hearing ran until April 22nd of this year?

A. Yes, sir.

Q. And by that time, how much of the hearing had been concluded, what remains to be done?

A. The cross examination of United's direct case has been completed. By that time the remaining steps in the proceedings are the introduction of direct cases by the FPC staff and intervenors which are scheduled to occur Monday, May 24, and in fact did occur on that day. They distributed their prepared testimony and exhibits which are quite extensive. The next step is that if United has any rebuttal to the testimony put in by the intervenors and staff on Monday, we have until June 11th to file and distribute that rebuttal testimony and prepare for—and on June 21 a hearing will commence on this testimony and exhibits that have been subsequently introduced and this will be followed by either a decision by the examiner or if that is omitted on motions of the parties, a decision by the Commission of the questions presented in that proceeding.

Q. Mr. Cassin, in connection with the matters at issue in this lawsuit, there has, from time to time, been reference to what has been referred to as Order 431, issued by the Federal Power Commission on April 15, 1971. I have just handed the Court a copy of that order as the next exhibit and I would ask you to explain briefly what that order is.

A. This order, which was issued without prior notice, as is evident, propagates a statement of general policy of the Commission. The Commission first notes that the system which I described on United's system of inability to fill storage is one that affects the entire pipeline industry, virtually all pipelines and it is one that the Commission is concerned about and they felt that something needed to be done about it.

Q. And this was not in the curtailment proceedings?

A. No, sir. This came like a bolt out of the blue. It was issued—came public about 11:00 o'clock one morning as we were having our morning break from the curtailment proceedings and it created quite a stir.

Q. And what was United directed to do?

A. Specifically, as the ordering portion begins on page two of the order, and on page three, United being a natural gas pipeline company, is directed to make every reasonable effort to fill all storage fields supplied by us to capacities

sufficient to meet anticipated heating season demands. We are also directed to file a written report within 30 days, telling them how we intend to accomplish this and to file tariff sheets setting out a curtailment procedure or a statement indicating that the tariff sheets were already filed, that would be our curtailment plan. They also directed us to give consideration to curtailment of volume that is equivalent to uninterrupted sales and curtailment of large boiler fuel sales where alternate fuels were available. The third paragraph is a technical provision that indicates how we should go about buying spot gas.

The fourth provision indicated that volumetric limitations at current levels should be imposed on all sales where a curtailment program was in effect. They indicated that they, in future rate cases, would re-examine the way that they allocated cost to industrial—between industrial and non-industrial sales and finally exhorted this generally to everything that we possibly could do to alleviate the situation.

Q. All right, did you respond to Order #431 within the time stipulated by the Commission?

A. Yes, sir, we did. The 30th day fell on a Saturday and on the 17th of June, we filed our response which was within the time allowed.

MR. HARVIN: Your response is offered as the next exhibit, Your Honor, it is a letter addressed to the Commission and dated May 14th, which you have before you.

BY MR. HARVIN:

Q. Mr. Cassin will you briefly tell the Court the nature of the response.

A. In the response we discussed our reaction. We said that while it could be argued that our summer curtailment program should be modified to comport with what the Commission indicated, that they thought that the way that the curtailment program should go forward—we felt that since all of our customers knew what this program was, they had all had opportunities to cross examine our witnesses on it and since the proceeding on—determining whether this was an appropriate program or not was well advanced and proceeding on an expeditious basis, that we could not propose to change it.

We had previously indicated that we did not necessarily want to change our program applicable to our winter season but we felt compelled to do so by Order #431 and therefore

we proposed certain amended tariff sheets that would take effect on November 1, 1971. I might say also, I wanted to mention one part of Order #418, a very important portion——

Q. You mean Order #431?

A. Order #431, in paragraph number seven on page four, if Your Honor could see that, it says "Jurisdictional pipelines have the responsibility in the first instance to adopt a curtailment program by a filing of appropriate tariffs. Such tariffs, if approved by the Commission, will control in all respects, non-withstanding inconsistent provisions in sales contracts, jurisdictional and non-jurisdictional entered into prior to the date of the approval of the tariff." Therefore, we stated that in filing these tariff sheets, because of that language in the Commission order, we were amending, not only our tariff but, as we saw it, our direct sales contracts. The two principal changes that we made were—in the order of priority, were to accord higher priority to industrial gas that was used for process purposes. In other words, where—well to take a specific example, where Monsanto turns methane, that they derive from natural gas that they buy from us, into nylon. (1) Where the natural gas is converted and used as a raw material, rather than as a boiler fuel. The second change was since the alleviation of the shortage on United system had required United to purchase spot gas at very high prices and future alleviations may entail such steps as construction of large plants for the gasification of naphtha or such very expensive measures as this and since the Commission had told us in plain terms, in paragraph five of Order #431 that they intended to review the allocation of cost between—that they had established in the 1960's between industrial and non-industrial gas sales, we felt compelled to make it clear that industrial users of our gas, direct industrial customers of ours, would have to be willing to pay, during the curtailment period, as much for the gas as our domestic city gate customers paid for that gas in order to enjoy the same priority that they have had last year.

Q. That was filed in the proceeding in response to Order 431?

A. Yes, sir.

Q. That was not filed in the curtailment proceeding?

A. No, sir.

Q. All right, now, returning for just a moment to the cur-

tailment proceeding, I believe you mentioned that under the schedule that the various intervenors who desired to file testimony in that proceeding were required to do so by May 24, 1971?

A. Yes, sir.

Q. And on that date, was there filed in the curtailment proceeding, testimony by Mr. G. H. Box on behalf of Mississippi Power and Light Company?

A. Yes, sir. Mr. Box was the vice-president of the Mississippi Power and Light Company, his testimony was filed on that date.

MR. HARVIN: Which we offer as the next exhibit, Your Honor, again in connection with the jurisdictional issue and we point out as indicated by Mr. Box on page three of his testimony, that Mississippi Power and Light is one of the four operating subsidiaries of Middle South Utilities Incorporated. The others are Arkansas Power and Light Company, Louisiana Power and Light Company and New Orleans Public Service, Inc. Now turning, Your Honor, from the curtailment proceeding to the proceeding before the Federal Power Commission which is numbered CP71-89 and which is the proceeding in which United has applied for certificates of convenience and necessity for the purpose of serving the New Orleans area which is undisputed as an area that includes one of Louisiana's power and light stations that is involved in this lawsuit before Your Honor, the Nine Mile Power Station.

As the first exhibit, we offer a letter from the secretary of the Power Commission to Mr. John C. Nelson, the executive vice-president of United Gas Pipeline Company, on the date of September 17th——

MR. BARBER: May it please the Court, may we ask Mr. Harvin what exhibit number was the last one? I think we may have lost count.

THE COURT: Thirteen, I think.

MR. HARVIN: I think Mr. Harvin has lost count also, Your Honor.

MR. MALLORY: I have fifteen.

MR. BARBER: That is what I have.

THE COURT: Fifteen, then.

MR. HARVIN: In that letter, the Commission's secretary wrote Mr. Nelson as follows: "A review of our records failed to disclose any filing under sections seven of the natural gas act by United Gas Pipeline Company in com-

pliance with the holding of the Court in the Florida parishes case, 359 Federal Second 525. Please advise us within ten days of your disposition in this matter so that the Commission may take whatever action it deems appropriate." And for Your Honor's convenience I have a reproduced copy of the Florida parishes decision which is referred to in that letter.

By Mr. Harvin:

Q. Mr. Cassin, did United respond to that letter from the Commission?

A. Yes, sir, we did. On October 1, we responded to the letter by saying that we would file, very shortly, a document in compliance with the holding of the Court in the Florida parishes case and we did on October 1, file an application for a certificate covering the facilities that had previously been considered local in nature, lying largely in Southern Louisiana but there were also some in Texas and this certificate also—this certificate application covered not only the facilities but also the jurisdictional sales and services specifically including what we considered to be jurisdictional sales and services to our customers—to our direct industrial customers.

Mr. Harvin: We hand the Court, as our next exhibit, the application of United Gas Pipeline Company, for certificate of public convenience and necessity in CP71-89. This was filed, Your Honor, on October 1, 1970 and I would ask the Court for a moment to turn to page three of that exhibit where it is noted in an earlier proceeding the Commission had held, that the United sales in the Florida parishes of Louisiana were made in inter-state commerce and were subject to its jurisdiction, which order was subsequently affirmed on appeal and the opinion, a copy of which the Court has before it; and that the reasons pointed to by the Commission for holding those earlier, subject to its jurisdiction indicated that other sales and facilities of United previously regarded as within the jurisdiction of the states of Louisiana and Texas are subject to the jurisdiction of the Federal Power Commission.

Among those being, that the gas sold as part of a single uniform stream flowing through United's inter-state pipelines from the point of purchase in Louisiana, whether on shore or off shore to United's customers in other states and that once gas has been sold by a producer to an inter-state commerce, even though some of that gas was sold in

state commerce, even though some of that vas was sold in the states in which it was produced and as is indicated in paragraph five of this application, United's sales in south Louisiana and south Texas are regulated in those respects, respective states by the appropriate commission, as was the fact in the earlier Florida Parishes litigation.

All the gas delivered to these locally regulated sales is produced, transported, sold, and consumed wholly within the state exercising regulatory jurisdiction, excluding consideration or resolution of the effect of offshore south Louisiana production; however, part of the gas delivered to the customers in south Louisiana and south Texas is transported at sometime through pipelines which carry gas in a co-mingled stream, which stream thereafter crosses a state line and part of the gas delivered to these particular sales, is purchased from producers, issued certificates of public convenience and necessity by this Commission, authorizing sale of the gas in inter-state commerce.

And in paragraph six, on the next page, that considering those facts and the Commission's earlier reasoning in the Florida parishes decision, it is apparent that all United's transmission facilities, in south Louisiana and the services it performs through those facilities are inter-state in character and are subject to regulations by this Commission to the extent authorized by the act. The document, as the Court can see, is a very lengthy one. It has numerous exhibits attached to it, including many drawings of the entire system, some of which I am sure we will get to a little later in this hearing.

Now, again upon the filing of this application, the Commission issued its notice which was served upon customers and interested parties which is offered as the next exhibit, that notice being on October 15, 1970.

The next exhibit is the petition to intervene, filed in CP71-89 by the Public Service Commission of the State of New York, which was filed on December 18, 1970.

The next exhibit is the petition to intervene which was filed by Louisiana Power and Light Company on February 12, 1970, 1971 I beg your pardon, which recites that LP&L did not learn of the petition to intervene of the Public Service Commission of New York until February 8, 1971, which petition was filed 43 days after the date fixed in the notice of hearing. The limitations and conditions which the New York Commission requests on any certificate to

United in this proceeding will seriously affect LP&L and it wishes to oppose said petition unless the request of the New York Commission is denied without hearing.

Then, in its petition to intervene, LP&L again recited its Sterlington and Nine Mile Point contracts with United it again recited the impairment of delivery clauses in those contracts which it urges, are being violated here and it took the position, as it had in its petition to intervene in the curtailment proceedings, that the Federal Power Commission had no jurisdiction of the natural gas supplied to LP&L under the Sterlington and Nine Mile Point contracts, these being contracts for the direct sale of natural gas for consumption, exempt under section 1B of the Natural Gas Act.

I would call to the Court's attention that there is nothing in that petition to intervene nor is there anything in the petition to intervene in the curtailment proceeding filed by LP&L which states any other exemption or basis for lack of jurisdiction of the Commission, such as the point made by Mr. Carter in the course of our conference immediately before this hearing, namely that the Nine Mile Station is served entirely by a local system with local gas and I would also point out, I hope without necessity of reading the entire original complaints and supplemental complaint filed in this cause, that there is nowhere in either of those complaints any reference to any basis of lack of jurisdiction of the Commission except on the ground that an industrial direct sale is exempt under section 1B of the Gas Act.

By Mr. Harvin:

Q. Mr. Cassin, did the Commission hold conferences concerning the certification proceeding after the petitions for intervention were due to have been filed?

A. Yes, sir, there were two informal settlement conferences held among all parties and the staff of the Commission on—the first one was on May 4, 1971 in Washington and the second one on May 19, 1971 in Washington.

Mr. Harvin: And the next exhibit is the Commission's order of May 14, 1971, fixing the date of hearing and granting intervention.

By Mr. Harvin:

Q. Mr. Cassin, can you tell us about the intervenors in that case, 71-89?

A. Yes, sir, as the Commission's order reflects, there are about twenty or twenty-two intervenors as of May 14th who were allowed to participate. Since that time we have gotten one or two more intervenors. These intervenors are five of United's direct industrial customers and now we have added three more to make it eight direct industrial customers, three pipeline customers of United, seven city gates who are customers of United and six in the miscellaneous category in the New York Public Service Commission, the Louisiana Public Service Commission, the City of New Orleans, Laclede Gas Company Service in St. Louis, and then some of the eastern pipelines and distributors who receive gas from United's pipeline company customers.

Q. All right; I think that on exhibit, listed on page two, it is correct, is it not, that in addition to Louisiana Power and Light and another member of the middle south, New Orleans Public Service Inc., is listed as having filed its petition to intervene.

A. Yes, sir, and they were allowed to intervene.

MR. HARVIN: I call the Court's attention to page three of that order in which it is recited, with respect to the allowance of the petitioners to intervene, in addition other petitioners allege that the Commission does not have jurisdiction over certain transactions that are reflected in United's application and that they intend to demonstrate that these transactions are beyond the Commission's jurisdiction under existing laws. The Commission is of the opinion that the afore-mentioned petitioners have shown good cause for their late filing.

The Commission will set this matter down for an early hearing in which it will require that the resolution of the jurisdictional status of the facilities involved herein be accorded the highest order of priority as well as whether the present and future public convenience and necessity requires permanent authorization of any or all of the deliveries in whole or in part and the Commission therefore required that United File it's direct case on or before May 24, and that cross examination commence on June 7 of this year.

The next exhibit is United's filing of May 24, 1971, in response to that Commission order of May 14th. Attached to the covering letter, there, Your Honor, is the prepared

testimony of J. H. Ectorhoff, which I would ask the Court to turn to for a moment and if Your Honor would open up the first map that is attached to that testimony and let me go through a short exercise here that perhaps, I hope at least will shed some light on some of the testimony that Your Honor may subsequently hear during the course of this afternoon.

This is Mr. Ectorhoff's description of the map, Your Honor. It shows the pipelines owned and operated by United Gas Pipeline Company, at least in the New Orleans, Jackson, Shreveport and Victoria divisions. It shows other data including community service—communities served, major industrial deliveries, compresser stations, extraction plants, gas field supplying pipeline systems as well as operating divisions, boundaries and district lines and the legend sets up the various symbols that identify these items. You will note that it has an unshaded area in South Louisiana which is labeled New Orleans Division. The lines colored in green in the New Orleans District of the New Orleans division were previously considered local in nature and have not been certificated by the Commission. In this application United seeks certification of such facilities together with the certification of the jurisdictional services rendered thereby. The purple lines shown in the Lafayette District of the New Orleans Division show facilities which, together with the services rendered thereby, have been only partially certificated and their total certification, for both the facilities and services, is sought in this proceeding to the extent of the Commission's jurisdiction.

The Court will notice that there are a number of points designated A through X, they are in a yellow or orange color and they are major connections between inter-state facilities which have been certificated and facilities that are sought to be certificated in this application. It is at such points that a single uniform stream of gas is split with some of it continuing on to markets outside of the state and some of it to markets within the state. There is more information in here about other districts and divisions but we are principally concerned, in this lawsuit, I think and as to this point that is before Your Honor, only with this New Orleans Division Area. Mr. Ectorhoff goes on to point out, and I don't want to take a lot of time and go into a lot of detail about this phase of his testimony and I am offering it only to show what is before the Commission in

the New Orleans district, old district five. Mr. Ecterhoff gives figures in his answer in which he concludes that there will be a deficiency in peak day supply in that district from just intra-state facilities for 1971-72 and 1972-73 of 589 MCF per day and 681 MCF per day respectively and he is there, on page eleven asked how that deficiency would be handled. "You have indicated previously that any deficiency for the intra-state system will have to be supplied from your inter-state operations. Where would the increases from the inter-state system? This additional inter-state supply, to meet the deficiency in the City of New Orleans area, would have to come from the Egatian Bay-Lafrette, Mobile system including all fields connected thereto."

And then, in the next exhibit, which is marked JHE-4, Your Honor, headed New Orleans District inter-state facilities to intra-state facilities, first co-mingling occurred July 25, 1965. It is a one page exhibit.

THE COURT: That is on Mr. Ecterhoff's exhibit?

MR. HARVIN: If you will look at my copy you can see where I am referring to, Your Honor.

THE COURT: I have it now, sir.

MR. HARVIN: He says, "This exhibit sets out the volume of gas that has been transferred from the inter-state facilities into the intra-state facilities in the New Orleans district for the years 1965 through 1973 and as you will note the volume has been substantial. This transfer, or co-mingling will become even greater in future years when, considering the prior exhibits which show such a severe decline in intra-state reserves compared with increase in sales volume in this district." There is much more to his testimony and to the exhibits but I think that is the pertinent part that bears on the question of the utilization of inter-state gas supplies and the co-mingling of those inter-state gas supplies with intra-state or local gas in the New Orleans area. I might say that it is undisputed that the Nine-Mile station is located in the New Orleans area.

By MR. HARVIN:

Q. Mr. Cassin, with the filing of United's testimony of which Mr. Ecterhoff's testimony and exhibits were a part, what now is the schedule in the Commission's proceedings (CP71-89)?

A. The staff and intervenors have until June 7 to file their direct cases which is two weeks after our direct cases were

filed and cross examination on all testimony in the case is due to start that same day.

Q. The hearing will begin on June 7th?

A. Yes, sir.

Mr. Harvin: This week, in CP71-89, a motion of New Orleans Public Service, Inc., for a postponement of hearing and for an extension of time for serving intervenors cases. I offer that as the next exhibit. I would like to inquire, Your Honor, in that connection, if the Commission can advise whether that motion for postponement of the hearing in 71-89 has been acted upon yet, if the Commission's counsel can tell us.

Mr. Gooch: No, Your Honor, I cannot.

The Court: Thank you, sir.

Mr. Harvin: I believe that is all of the documents and presentation or live testimony that we think has to do with the issue that is before the Court. Mr. Barber has reminded me that—I believe that if can probably be stipulated by the parties, without the necessity of offering proof that the Sterlington Plant of Louisiana Power and Light is admittedly served by certificated inter-state lines of United.

I would like to inquire from counsel if that can be stipulated, Your Honor. If not; we will offer independent proof of it.

Mr. Carter: Your Honor, we can stipulate that we believe that the line is an inter-state pipeline and that there has been certificates issued for it. We do not know this of our own knowledge but we believe it to be so.

The Court: Thank you, sir, that will be sufficient.

Mr. Harvin: To remove any doubt about it and to move along quickly, Your Honor, referring to the deposition of Mr. N. T. Belvin, Jr. of United Gas Pipeline Company which was taken by Mr. Carter on May 24th, this week. Mr. Belvin was asked the question, "Can you tell me, Mr. Belvin, whether or not the sale, by you to Louisiana Power and Light, at the Sterlington plant, has been certificated by the Federal Power Commission?" to which, before Mr. Belvin could reply, Mr. Carter said, "We stipulate to that," Mr. McHenry of the Commission said, "stipulate to that," question, Mr. Carter, "sure."

The Court: Does that conclude your case, Mr. Harvin?

Mr. Harvin: Yes, Your Honor.

The Court: Will we next take up the Commission, do

you have any evidence or anything to produce, sir, Mr. Gooch?

MR. CARTER: Your Honor, before we get to that, may I add, if Mr. Harvin is completed with his case, if he is offering the documents that he has described?

THE COURT: I thought he had and that his case was complete.

MR. HARVIN: I thought and if I haven't I do.

THE COURT: All right, sir, and the case is completed.

MR. HARVIN: Yes, sir.

MR. CARTER: Well, at this point, Your Honor, we would like to object to all of the documents with respect to anything other than the limited purpose that the documents are actually documents that were filed in the proceedings indicated but for no other purpose.

Now, putting it another way, we should object to any of the documents—introduction of the documents for the purpose of their being the assertions of truth of the things that are said in the documents. If they are limited to that purpose, then we have no objection. When I say that purpose, the purpose of their being actual documents that were filed in the proceedings and nothing more, we would have no objection.

MR. HARVIN: We are offering them, Your Honor, in connection with this hearing, which as I understand it, is limited to the jurisdictional question before the Court because they represent an account of what has been taking place or is taking place at the Federal Power Commission now and show the position being taken there by the various parties to this lawsuit. I do not suggest, for one moment, that if this Court should, at a later date, decide to take jurisdiction of this case, if they have been offered in evidence where they would be admissible on the merits of the case or truth or falsity of the matters stated therein, but I do offer them for all purposes in connection with the jurisdiction which we say exists in the Federal Power Commission or at the very least, that the law gives them the right to determine the jurisdiction that it has and show that it is in the process of doing so.

THE COURT: The Court is going to sustain the objection to the extent that these documents be admitted into evidence but only to the extent that they are pertinent to the jurisdictional question before the Court.

MR. CARTER: Well, Your Honor, on that maybe we had

better point up something so that we can have a clarification of it.

THE COURT: All right, sir.

MR. CARTER: In one of these latter documents, there is testimony being offered by a gentleman by the name of Mr. Ectorhoff. His testimony, and by the way these last three pieces of testimony that have been offered here, Mr. Ectorhoff, Mr. Kirkland and Mr. Sanders, we have only seen that testimony in the past twenty to twenty-five minutes. If it has been filed, it has not been served on us heretofore. Consequently, we are in no position to be able to gauge what that testimony shows: It is quite bulky and on top of that, Your Honor, from just what Mr. Harvin has read here, there are statements being made by Mr. Ectorhoff in that testimony with respect to what kind of gas is flowing in the New Orleans district and how the flow is made and so forth. This, therefore, is testimony which could be said to relate to the jurisdiction—jurisdictional question involved here and we believe that that offer, therefore, is objectionable at this time for the purpose.

MR. HARVIN: The testimony is, Your Honor, for the purposes that are now before the Court, a motion to dismiss the sworn testimony—it is no different than any affidavit that the Court would consider on a motion to dismiss or on a motion for summary judgment and to remove any doubt about this matter at all, we have brought Mr. Ectorhoff here. If they want to ask him any questions about it, that are relevant to the matters here at issue, he is here and available. As far as Mr. Carter, whether he has had it or not, it has been served properly to the Commission and among the parties of the people that have been designated for services of the matter.

MR. CARTER: Your Honor, regardless of how it has been served, we have not seen it before twenty to twenty-five minutes ago when a copy was passed to us at the table here. If it has been served, therefore, it is still in the mail. As to the truth of the matters asserted therein, this has nothing but their words on cold paper, Your Honor, and there is no way we can cross examine that and to simply give us a pile of paper here at the eleven and a half hour and say Mr. Ectorhoff is in the back of the Courtroom and you can cross examine him if you have any doubt about it, is, I submit, is not a very good way of searching out the truth. We object to any assertion in these offers that

would go beyond the mere fact that they are documents that have been filed in the various proceedings. Anything that would go to the truth of any assertions therein, we object to and in the first place there are many, many self-serving declarations in there, Your Honor. All of these filings contain one after another, many of which Mr. Harvin has read to the Court.

MR. HARVIN: I never have quite understood the objection about self-serving declarations, even since I was in law school, particularly since I became a trial lawyer. It seems that all evidence seems to be cast in those terms and we think there is absolutely no difference between that portion of the record that is before the Commission and all of the other portions that are before the Commission.

THE COURT: The Court is going to take the position that this is certainly no more than the nature of an affidavit and look at it in that manner. The objection is overruled. If that is all, we will have a ten minute recess before continuing.

(Recess)

(Thereupon, the above mentioned exhibits were received into evidence and filed with the clerk of court.

MR. HARVIN: Your Honor, I misspoke on a matter immediately before the recess that I want to correct for the Court before we go on any further. I was under the impression, where we were discussing Mr. Ectorhoff's testimony, that it has already been sworn to at the time of filing. It has been filed and it has been served upon the parties. The procedure, I am told, at the Federal Power Commission, however, is for the witness to swear to it when he then gets there and he has not done so yet. He is present here in the courtroom and I would ask if he might be allowed to stand and have the clerk swear him on it.

THE COURT: Mr. Ectorhoff.

MR. CARTER: Your Honor, again I hate to be an obstructionist but this irregular, I think and I submit to the Court that when we had a little pre-trial conference here, about ten minutes before we started, Mr. Harvin assured the Court that he was going to introduce a number of documents for a limited purpose of showing that these documents had been filed in the proceedings in Washington, but now

here we are having an unusual procedure followed by having a bunch of statements put in the record by way of just exhibits and then we are going to have a gentleman stand up and be sworn and then his testimony gets certified that way. I think it is objectionable, Your Honor, except for the limited purpose that was outlined originally.

THE COURT: Well, the Court's only comment on that is the character of the green line was, I think, one of the points that was brought up by LP&L and the testimony being referred to is certainly pertinent to that point and that is the reason why the objection is overruled.

MR. CARTER: Well, Your Honor, it seems to me that if he is going to swear this witness in and have his testimony, then we ought to go ahead and put him on the witness stand and have him testify and have him subjected to the cross examination of normal events—in the normal events. Here we are going to have just a bunch of canned testimony like this was just another administrative proceeding and as far as I know it could contain leading questions and questions that would be improper. We have no way of protecting ourselves.

THE COURT: I think it would be proper to put him on the stand, then. You might put Mr. Ectorhoff on the stand and subject him to cross examination. You can ask him the questions which were read from the testimony and subject him to the cross examination on them.

MR. HARVIN: I would offer to put him on the stand at this time——

THE COURT: Yes, sir, if you would please.

MR. CARTER: Your Honor, just a moment, just a point of order. Would you like this to be done now or shall we cross examine Mr. Cassin first?

THE COURT: Well, Mr. Cassin has been on the stand and I didn't know you intended to cross examine him. I thought he was excused. Would you take the stand again, Mr. Cassin.

CROSS EXAMINATION

BY MR. CARTER:

Q. Mr. Cassin, in your job as vice-president and general counsel of United Gas Pipeline Company, have you been in charge of the proceedings on behalf of United in Washington

that I will refer to as the curtailment proceeding and the certificate proceeding?

A. Yes, sir.

Q. All right, and would you tell us what you understand a jurisdictional company to be? I use that term as a quotation from order #431, which is your Pennzoil-United exhibit #13.

A. That refers to jurisdictional pipeline companies.

Q. I see, and that would be somebody like United Gas Pipeline Company?

A. Yes, sir, a company which transports and sells gas for resale in inter-state commerce.

Q. Yes, sir. And what would be a non-jurisdictional company?

A. A company that doesn't fit that description.

Q. I see, and it would be a company, therefore, that was doing something that was not within the jurisdiction of the Federal Power Commission, is that right?

A. Yes, sir.

Q. And that would be a company that is producing and shipping and delivering gas in intra-state commerce, is that correct?

A. So long as a company does not transport or sell gas for resale in inter-state commerce, it is not a jurisdictional company. It may do both, it may transport gas and sell it for resale in inter-state commerce and parts of it's system, and it may to the contrary do it in not inter-state commerce in other parts of the system.

Q. Yes, so you may have a company that is jurisdictional in some part of this operation and non-jurisdictional in others, isn't that correct?

A. That is correct.

Q. And as a matter of fact, United Gas has been such a company up to this point, anyhow, hasn't it?

A. At what point in time United ceased to—certain activities of United ceased to be non-jurisdictional, I don't know, it was considerably before this time as reflected in the testimony of Mr. Ectorloff about 1965.

Q. Well, Mr. Cassin, as a matter of fact, as to all of those facilities that are in 71-89 proceeding, they haven't become jurisdictional yet, have they?

A. Yes, sir, they have. They are jurisdictional. There are no certificates outstanding with respect to them but so long as gas is transported through those facilities and

sold for resale in inter-state commerce, they are jurisdictional facilities.

Q. Mr. Cassin the FPC has not issued an order in the 71-89 proceeding saying we have jurisdiction over all of these facilities or any part of these facilities, has it?

A. That is correct.

Q. And until such time as it does, it is not under the jurisdiction of the Federal Power Commission, is it?

A. That is incorrect. That is wrong.

Q. Mr. Cassin, are you familiar with the filing that your company has made on May 14, 1971, in response to order #431?

A. Yes, sir, I am.

Q. That is your Pennzoil United exhibit #14?

A. Yes, sir.

Q. Now, in that exhibit, you have stated that the filing that is being made by May 14, 1971 document and I am now going to quote: "Will be made by appropriate filing at an early date in docket #RP71-29." That is the last sentence on the second page. Would you care to look at it? Have you made that filing yet?

A. The last sentence on the second page?

Q. The last sentence of the first paragraph of the second page.

A. No, sir, we have not made that filing yet.

Q. Are you preparing to make it?

A. Yes, sir.

Q. Now, when you make that filing Mr. Cassin, you are going to be requesting that your tariff, as you have revised it as an appendix to that document, be approved by the Federal Power Commission, is that correct?

A. You assumed in your question, Mr. Carter, that we are going to file an amendment to our tariff, but that is not what we say in that last sentence. We are not going to amend our tariff.

Q. Well, Mr. Cassin, you have something that is attached to your document of May 14, 1971 that appears to be entitled "General Terms and Conditions" and up at the top it is called "S.E.C. Gas Tariff", now is that part of your tariff or not?

A. That is and that is not referred to in the last sentence of the paragraph that runs over on page two.

Q. But that is not what I am asking you right now. I

am asking you if you intend to file this revised tariff that is appended to your document in the curtailment proceeding?

A. No, sir, it was filed with the Commission on May 17th with this letter.

Q. All right. Do you intend for this revised tariff to be part of your curtailment program?

A. We intend for this revised tariff to be part of our tariff.

Q. And also to be considered in your curtailment proceeding?

A. We intend for this revised tariff to be considered a part of our tariff, now what the Federal Power Commission may do with this, I don't know. We have no power over whether they will make this a part of our curtailment proceeding or not.

Q. Look, Mr. Cassin, time is so short——

MR. GOOCH: I object to this line of questioning Your Honor. It is within the discretion of the Federal Power Commission whether to treat this filing as a new filing or whether to enroll it into the present curtailment program, whether it is suspended, effective for the whole suspension period which would be beyond the summer contention policy or whether to let it go into effect or prevent it from going into effect, all of these will come before the Federal Power Commission and I don't believe Mr. Cassin is qualified to answer what will happen to this tariff filing.

THE COURT: I don't really think that Mr. Carter is trying to find out all of that. I think I will allow the question. It is within the scope of cross examination. Go ahead, sir.

BY MR. CARTER:

Q. Mr. Cassin, take your copy of the document in hand, please. Look at the first page of that revised tariff that is appended to your exhibit #14. Turn your attention to the paragraph #12, and will you please advise that you understand that paragraph covers what is known as impairment of deliveries?

A. Yes, sir, that is correct.

Q. And is impairment of deliveries a subject that is part of your proceedings in the curtailment matter?

A. Yes, sir, it is.

Q. So this revised tariff proposal that proposes to amend your order of curtailment, does it not?

A. Effective November 1, 1971.

Q. Now, the fifth in these revised tariff refers to those who are obtaining gas by direct sales, does it not, Mr.

A. Yes, sir.

Q. And do I understand that paragraph to indicate that United contemplates increasing the price of gas to those direct sales customers whose rate right now is less than the one hundred per cent load factor applicable for City gate customers at the applicable rate zone?

A. No, sir, that is incorrect.

Q. Is it correct, then, that you contemplate having, either those direct sales customers give you an increase for the price of your gas, or be curtailed in this category?

A. That is correct.

Q. So they have an alternative. They can either pay you more or be the first people to be curtailed?

A. Yes, sir.

Q. Now, there is also a contemplation of an increase in your rates in this revised tariff by way of a change in your demand charge adjustment and substitute fuel payment obligations, isn't there?

A. Yes, sir.

Q. That is in paragraph #12.3 of this revised tariff?

A. That is correct, except to the extent that the elimination of the demand charge adjustment has already been provided for in an earlier filing made March 30, in which the Commission has suspended for one day, to become effective June 2.

Q. All right. To the extent that that hasn't been done, this would do it——

A. Well, the other filing will take it from effective June 2 so this filing will have no effect on that elimination of the demand charge adjustment because it wouldn't be effective according to our proposal until November 1, in any event.

Q. It will have effect on your substitute fuel clause, does it not?

A. Yes, sir. If the Commission finds that this provision is just and reasonable and in the public interest and allows to become effective, it will have an effect on the substitute fuel clauses.

Q. And the effect of it will be to raise the cost to those direct customers of United who have to use substitute fuel?

A. Not necessarily.

Q. If the fuel they can get is less than gas, is that why you say not necessarily?

A. If United is obligated to pay these customers under it's contract with them, any amounts, or would otherwise be obligated to pay them any amounts, and is excused from paying those amounts by virtue of this clause, then to that extent it could be said it will raise the price to those customers.

Q. And you do have such contracts with direct sales customers whereby you have to adjust for substitute fuel usage?

A. Yes, sir, and we take the position, as of right now, that we have no obligations to those people except for the first seven day of November 1978.

Q. Well, really you are taking the position that, with respect to all of this business of yours, you have no obligations to your customers, don't you?

A. That is not correct.

Q. Well now, don't you have customers who have contracts—I beg your pardon, not customers, producers who sell gas to you who have contracts with you containing restrictive provisions in them whereby you are not to take their gas and put it into an inter-state line or co-mingle it with inter-state gas?

A. The first portion of your statement is correct. We are obligated not to move the gas out of state. The second portion of your statement is incorrect. We are not under any obligation not to co-mingle gas with inter-state gas.

Q. Mr. Cassin, aren't you in an obligation, in those contracts we are referring to with some of your producers to do whatever is necessary with that gas to keep it from being jurisdictional gas?

A. No, sir, we have had producers propose clauses exactly like that and we refuse to enter into them.

Q. Don't you have a contract with Pennzoil Producing Company—containing such a restrictive provision?

A. Not to my knowledge.

Q. You don't have any contract with Pennzoil that requires you to put their gas only into intra-state facilities?

A. That may be so.

Q. Well, is it so.

A. I am sure that that is so.

Q. And you are putting that gas into that so-called green

line that has been testified about in the proceeding in Washington by Mr. Belvin, are you not?

A. Yes, sir.

Q. Now the Florida parishes——

A. May I clarify that? Once again, to state that we are obligated—that we are to put this gas into intra-state facilities means we are obligated not to move it out of the state of Louisiana. Now that is our obligation to all of these producers and we are complying with that obligation.

Q. All right, and this is gas that is produced in Louisiana, is that not correct?

A. That is correct.

Q. And when it goes into that green line, in all of the facilities that are on the green line that are in Louisiana, are they not?

A. That is correct.

Q. And people like Louisiana Power and Light Company and New Orleans Public Service and all of those customers in that New Orleans district are all located in Louisiana, are they not?

A. That is correct.

Q. And as far as you know, they all consume that gas in Louisiana, do they not?

A. Yes, sir.

Q. All right, now, are you familiar with the Florida's parishes case?

A. Yes, sir.

Q. That case was only in 1965 or 1966, was it not?

A. Certiorari was denied in 1966.

Q. Yes, sir. Can you point to any sentence in that decision that requires you to make a filing such as you have made in 71-89?

A. No, sir. I—to the extent that the Supreme Court didn't say "United will make a filing", obviously the principals announced therein settled some issues that made clearly jurisdictional some facilities and services that hadn't been thought to be jurisdictional.

Q. Mr. Cassin, you testified about being at a conference in Washington in the 89 proceeding, sometime in May, I believe it was, did you not?

A. That is correct.

Q. And at that conference United suggested some calculations and figures with respect to what they called "non-compensatory sales" did it not?

A. Yes, sir.

Q. And I am showing you an exhibit which has already been identified in the discovery stages of this proceeding as LP&L Belyin #5 and I ask you to look at that exhibit, look at the figures and confirm to me that those are the figures that you submitted to that settlement conference.

A. I cannot do so because this is not the same sheet that we used.

Q. Do you have the same sheet available to you in this courtroom?

A. No, sir, I do not.

Q. You mean with all of the exhibits that you have brought here, you have a table full of exhibits and you don't have those figures?

A. That is correct.

Q. Well, let me ask you this. Did you say to me that this is not a correct figure that shows that you are claiming a deficiency, I think you call it, an average deficiency of 6.67 cents per MCF on those sales that are listed up above, namely Boise Southern City Service, Gulf States at Willow Glen, LP&L at Nine Mile point, N.O.P.S.I., and Shell Oil.

A. I haven't seen the sheet before, Mr. Carter and so I just can't say that the figures set out here are accurate, that the words on here are accurate. I just can't say that that is so.

Q. Mr. Cassin, you are in charge of United's handling of this proceeding, did you handle that conference with United?

A. Yes sir, I did.

Q. Did you suggest some calculation in that conference that were proposed as a settlement on the basis of United's getting more money for its gas from those customers that are listed in this exhibit?

A. No, sir.

Q. Well, what was the purpose of suggesting the figures then, Mr. Cassin?

A. The purpose of suggesting the figures was to show that with respect to six customers, including LP&L, United's cost of gas purchased in the field exceeded the revenues derived from the sale of that gas to these customers without taking into consideration United's expenses in transporting that gas and that the difference in cost is great now, it will get greater in the future, cost many millions of dollars. It threatens to impair the financial liability of United Gas Pipeline Company and threatens

to make it so that United cannot serve any of it's customers, including LP&L.

Q. Mr. Cassin, wasn't the purpose of those figures plainly to get those companies to agree on an increase in the rate of gas—the price of the gas—furnished to them?

A. The purpose of those figures was to demonstrate to all persons present at that conference what the difference in gas cost and revenues on United's system was.

Q. All right, and did you arrange, or do you know of any arrangement made by United to meet with personnel from N.O.P.S.I? I will pick them out as an example, specifically, to meet in order to discuss these very figures in terms of whether N.O.P.S.I. would be willing to undergo that increase.

A. Yes, sir.

Q. And that has happened, has it not?

A. Yes, sir.

Q. And United's position with N.O.P.S.I., in those discussions was that it wanted N.O.P.S.I. to agree to increase of the cost of gas to about approximately 6.7 cents per MCF?

A. United did advise N.O.P.S.I. at that conference and had previously advised them long before that United anticipated that the certificate CP #71-89 might not be issued at all with respect to sales to N.O.P.S.I. for the industrial use in its generating plant unless that sale was at a "compensatory" price and in fact the staff of the Federal Power Commission, at the conference that you are talking about, took that position and said that they were going to oppose the issuance of any such certificate in non-compensatory price. With that background and in that setting, we met with N.O.P.S.I. to discuss with them the possibility of amending their contract to provide for compensatory price in order to insure that the certificate issued and the service continued.

Q. All right. Did your company—who in your company prepared those figures, Mr. Cassin?

A. I don't know.

Mr. Carter: Your Honor, except for a reservation of my statement of position when I said LP&L's statement of position that was filed yesterday with the Commission, we didn't bring it with us, it didn't seem to us that it would be germane here but in view of all of these filings, that we have seen today, we wish to reserve a place for that state-

ment of position as exhibited here, so that you will have all of the documents.

THE COURT: That is the statement of position made by LP&L?

MR. CARTER: Yes, Your Honor.

THE COURT: Yes, sir.

MR. CARTER: —in the 29 proceeding.

THE COURT: Would you like to cross examine, sir?

MR. GOOCH: Yes, Your Honor.

MR. CARTER: Your Honor, I would object to any cross examination by the Federal Power Commission. They are aligned here, legally, with United Gas Pipeline Company and indeed their whole motion to dismiss is a deed, double carbon copy, you might say, identical language.

MR. GOOCH: Your Honor, I don't mind whether my questions are regarded as direct or cross, it doesn't make me any difference.

THE COURT: Objection overruled, proceed, Mr. Gooch.

DIRECT EXAMINATION

By MR. GOOCH:

Q. Mr. Cassin, please refer to what I understand has been identified as exhibit #14, which I understand is what United Gas Pipeline Company has filed in response to the Federal Power Commission's policy statement issue order #431.

A. Yes, sir.

Q. Now, attached to that document are some tariff sheets?

A. Yes, sir.

Q. Those are the tariff sheets that Mr. Carter was asking you questions about, is that correct?

A. Yes, sir.

Q. Mr. Cassin, has the Federal Power Commission permitted United Gas Pipeline Company to implement those tariff provisions?

A. No, sir.

Q. Now, Mr. Cassin, I did not object in any way to the questions and answers that you gave to Mr. Carter in connection with your views, as to what constitutes and to what might not constitute, so let me ask you only a couple of questions. Does United Gas Pipeline sell gas in interstate commerce?

A. Yes sir.

Q. Does United Gas Pipeline sell gas to other inter-state pipelines? Would you name some of them?

A. Texas Eastern, Southern Natural, Texas Gas, Mississippi River Fuel.

Q. That is enough, I just wanted them for the purpose of examples, now, let's talk a minute, Mr. Cassin, about the area up around Shreveport, Louisiana. Is there any question that those facilities by which gas is delivered to such customers as Louisiana Power and Light subject to the jurisdiction of the Federal Power Commission?

A. No sir, they are subject to the jurisdictional Federal Power Commission in north Louisiana and they have been certificated also. All facilities in the pink area on the map attached to Mr. Ectorhoff's testimony referred to earlier are jurisdictional.

Mr. Gooch: Now if the Court please, I would like to have marked a map which has so many reference numbers on it, I hardly know which one to use. Perhaps I should use the most recent marking which is LP&L Belvin #1. May I approach the witness, Your Honor?

The Court: Yes, sir. Would you like to identify that as Commission Exhibit #1, just to keep them in order?

Mr. Gooch: Yes, sir, and this will be, then, further identified as the Commission's first exhibit.

By Mr. Gooch:

Q. Mr. Cassin, in response to questions by Mr. Carter, we have been talking all along now, about a green system and a black system. Just for purposes of our discussions.

A. Yes, sir.

Q. All right, now, is this exhibit by which these color codes come from?

A. Yes, sir, it is.

Q. Now, Mr. Cassin, I want to direct your attention down to the off-shore area of southern Louisiana.

A. Yes, sir.

Q. But within either the disputed zone or clearly within the boundaries of the state of Louisiana.

A. Yes, sir.

Q. Does United Gas Pipeline Company have producer certificates authorizing producers to sell gas to an inter-state commerce through United Gas Pipeline from these areas?

A. United purchases gas from producers in those areas and the producers have certificates from the Federal Power Commission specifically in the Bastian Bay area and the Bay Marshand area and others.

Q. Does gas that is certificated for the inter-state market, by the Federal Power Commission on some of those areas, that you noticed, pass through this black system and on out of the state of Louisiana?

A. Yes, sir.

Q. Does some of this same gas purchased under the inter-state producer contracts, is that also delivered in the green system?

A. Yes, sir.

Q. And Mr. Cassin, is there any doubt in your mind that the Federal Power Commission has already issued certificates dealing with the black system as marked on this map?

A. Yes, sir, I mean there is no doubt in my mind that the Federal Power Commission indeed has issued such certificates.

Q. I apologize for the way I phrased the question and is there any question in your mind that there is pending, before the Commission right now, a proceeding which will determine the jurisdictional status of the green system?

A. There is no question in my mind that document CP71-89 is such a proceeding and it covers not only the facilities shown on the green but all of the sales and services off of those facilities including the sales to Louisiana Power and Light at the Nine Mile Point.

MR. GOOCH: I believe that is all, Your Honor.

RECROSS EXAMINATION

BY MR. CARTER:

Q. Mr. Cassin, how do you know that the gas—how do you know about the gas flows in this green system?

A. With respect to the two questions that I was asked on gas flows, that has been a matter that has been discussed time and time again over the course of the past year in our company and it is a matter of common knowledge among all of the officers in the company with respect to those two flows. Specifically I was asked about gas from—for instance, Bastian Bay and Bay Marshand that flowed out of the state of Louisiana and the answer was yes, that that

is just common knowledge in our company and also that gas from those fields reach the green system and the answer to that is also common knowledge, which is yes. It has in the past and will in the future.

Q. Well, Mr. Cassin, I think I understand you a little better now, but I want to ask you some questions on this so that the record will be clear. Are you referring now to the gas in those fields flowing somieplace, is that correct?

A. Gas in those fields flowing—being purchased by us under a contract, which is on file with the Federal Power Commission at these producers jurisdictional rates schedule, yes sir.

Q. But it is also true that gas from those fields is gathered and run through meters into the green system, is it not?

A. It goes through the black system before it reaches the green system.

Q. Mr. Cassin, if you don't know, tell me now, you are not telling me that the gas that Texaco sells you, for example, over in the Paradis field ever touches any part of any black line?

A. That is not gas, that is sold to us under a contract which is on file with the Federal Power Commission as Texaco's jurisdiction rate schedule and I didn't testify to that effect.

Q. Mr. Cassin, we are not asking you about that, now, we are asking you about the green line.

A. You were asking me, before, about gas purchased from the jurisdictional fields.

Q. Mr. Cassin, let's go back to the jurisdictional fields, as you like to call them. Isn't it a fact that you are—that United is getting gas from, let's take the Lirette field?

A. Yes, sir.

Q. And you are placing it directly through a meter into the green line?

A. No, sir.

Q. Well, would you kindly tell us how the Lirette Paradis line has any black gas in it?

A. Pardon me, I may have spoken too quickly.

Q. Yes.

A. We have gas coming out of the Lirette field that goes directly into the black line, yes, sir.

Q. Directly into the green line?

A. The green line, and we also have gas that goes directly into the black line.

Q. I tell you what I am going to do, I am going to ask some questions of some of your other people who will have more direct knowledge about this, but I do want to ask you this because you said something about it in the curtailment proceeding. Is it correct, as far as you understand it, that the green system is an integral system and that no gas flows out of the green system into the black system?

A. That is correct. It is not integral to the extent that it is not part of the common system of United in south Louisiana. It is not wholly separated integrally, it is part of United's common system in south Louisiana but to the other part of your question, "does gas flow from the green system to the black system" the answer is, no it doesn't.

Q. Right. Have you had a chance to read Mr. Belvin's deposition?

A. No, sir, not very extensively. I received a copy late last night. I dipped into it but that——

Q. That is all right if you haven't read it, I won't ask you about it.

MR. CARTER: That is all, Your Honor.

MR. HARVIN: I have one question, Your Honor.

RE-DIRECT EXAMINATION

BY MR. HARVIN:

Q. Mr. Cassin, when the application is made to the Federal Power Commission for a certificate of convenience and necessity, is one of the factors that the Federal Power Commission considers the compensatory nature of the arrangement in which the application is being made?

A. Yes, sir.

Q. And in factual, Commission, in cases such as South Georgia Natural Gas case in 1960, has refused to certificate direct industrial sales because they are not compensatory, has it not?

A. That is correct, yes, sir.

MR. HARVIN: That is all I have.

RE-CROSS EXAMINATION

BY MR. CARTER:

Q. And in those proceedings that you have just made a

filing on, which we got just about an hour ago here, the Kirkland and Sanders testimony, Mr. Cassin, are you familiar with that testimony?

A. Yes, sir, I am.

Q. And both of those gentlemen are either economists or work in the field of economics, don't they?

A. Mr. Sanders works in the economic field—the testimony speaks for itself as far as their background is concerned. Mr. Kirkland is primarily in the financial field.

Q. And their testimony has been the thrust of supporting an increase in compensation for United's natural gas being delivered?

A. Their testimony has a thrust of showing that if these direct sales are certificated and that the prices, without any change in the price, that United will very likely be unable to finance—not only expansion on its system but refinance its outstanding debt and finance the acquisition of gas that is necessary to be able to serve, not only its domestic or residential and jurisdictional pipeline Citygate customers but also these direct industrial customers including Louisiana Power and Light.

MR. CARTER: That is all, Your Honor.

MR. GOOCH: Your Honor, I have a couple of more questions, I am sorry.

FURTHER EXAMINATION

BY MR. GOOCH:

Q. Mr. Cassin, when the Florida parishes case, as we call them, these certificates—the Commission may decide that Mr. Carter and his clients are correct and issue a certificate at the present circumstances, isn't that correct?

A. Yes, sir, they may very well do that.

Q. And they may take the views of United Gas Pipeline Company and issue a certificate conditioned as United would have it, if they could have the best of all possible worlds.

A. We are not seeking a conditional certificate, Mr. Gooch, we are seeking an unconditional certificate. We feel, however that we are obligated to our customers, not only the ones affected by the Florida parishes compliance filing but to all of our customers and to all persons who receive our gas may be affected by our financial instability.

We just feel that we are obligated to point out these facts, now, and let everybody see what they are.

Q. Mr. Cassin, I didn't—I certainly didn't intend to get at your motives in any way. I just wanted to ask one of the options available to the Commission, in addition to accepting the views of Louisiana Power and Light and issue a certificate under the terms of, and conditions therein stated and the Commission might issue a certificate or not issue a certificate under terms that won't please the United Gas Pipeline Company, isn't that correct?

A. It might—it might issue a certificate with a condition as to price or as to volume, yes.

Q. Or, Mr. Cassin, the staff position as to whether it is an appropriate resolution of the certificated case may be accepted by the Commission, isn't that a possibility?

A. Yes, sir.

Q. And the other parties who participate in the certificate proceeding will also be heard, isn't that correct?

A. Yes, sir.

Q. So, until the Commission resolves the issue of the Florida parishes case the certificate cases, and determines under what terms and conditions the facilities will be certificated if at all, then there is no way to assist the impact of the Commission's decision, is there?

A. That is correct, there is no way.

MR. GOOCH: Thank you.

THE COURT: Any other questions of this witness?

You are excused, sir.

MR. HARVIN: Mr. Echterhoff, please.

J. H. ECHTERHOFF

called as a witness by United Gas Pipeline Company, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HARVIN:

Q. State your name, please.

A. J. H. Echterhoff.

Q. And your position with United Gas Pipeline Company?

A. Vice-President in charge of transmission operations.

Q. Mr. Echterhoff, in connection with the filing that United Gas Pipeline Company made to the Federal Power

Commission, dated May 24, which has been offered here in evidence, I believe you have been present here in the courtroom when excerpts were read from part of your testimony attached to that filing, have you not?

A. I have.

Q. Are you familiar with the testimony, you have been over it?

A. Yes, I am.

Q. And is it true and correct?

A. To the best of my knowledge, it is.

MR. HARVIN: That is all.

MR. CARTER: Your Honor, I think, again, I must review my objection to this manner of procedure in the United States District Court of putting testimony in the record by that means.

THE COURT: Note the objection. Are there any questions of this witness?

MR. GOOCH: If Your Honor please, I would like to ask, as I understood Mr. Echterhoff's dealing with transmission, in regard to that I would like to ask him the same questions that I asked Mr. Cassin.

THE COURT: Proceed, sir.

DIRECT EXAMINATION

BY MR. GOOCH:

Q. Mr. Echterhoff, let me show you what has been marked FPC exhibit #1 which is—perhaps can be better identified by you as an item of United Gas Pipeline Company's filing of a certificate case before the Federal Power Commission. Have you seen this before?

A. Yes, sir.

Q. Do you feel competent to answer some questions?

A. Yes, sir.

Q. Now, Mr. Echterhoff, this map shows some pipelines marked in green. Now, those pipelines marked in green, as I understand it, are the facilities which are pending before the Federal Power Commission for determination of the jurisdiction, are they not?

A. Yes, sir.

Q. All right, let me ask you this, are there inter-connections between this black system and this green system and this green system?

A. Yes.

Q. Now, this black system has already been certificated by the Federal Power Commission?

A. Yes.

Q. And it is transporting and selling gas in inter-state commerce?

A. Yes, sir.

Q. And some of that gas comes from down here in the southern part of Louisiana?

A. Yes, it does.

Q. And some of the gas picked up by the black system is certificated by the Federal Power Commission?

A. Yes, it is.

Q. All right, and that gas that is certified at the well——

MR. CARTER: I object to the leading, Your Honor.

THE COURT: Sustained.

MR. GOOCH: I will be glad to rephrase it.

BY MR. GOOCH:

Q. State whether or not gas that is sold by independent producers and delivered to the black system is certificated by the Federal Power Commission.

A. It is certificated by the Federal Power Commission.

Q. For sale in inter-state commerce?

A. For sale in inter-state commerce.

Q. Tell me whether or not, gas from the inter-state black system is in turn pushed or pulled into the green system?

A. Some gas is being put in the green system.

Q. State whether or not, other gas continues out of the state.

A. Other gas continues out of the state.

Q. Now, Mr. Echterhoff, Let me ask you this, are there any certificates presently in existence: I will ask it like this: state whether or not United has any certificates, right now, that authorizes the facilities or deliveries of gas to Louisiana Power and Light Nine Mile Point.

A. I am not sure I got that question.

Q. Maybe it is the way I had it phrased: let me ask you this: do you have any certificates at all, dealing with deliveries from the green system to various customers?

A. Not to my knowledge.

Q. Now, these little orange points on here, that have letters of the alphabet, do those indicate inner connections between the green and black system?

A. Yes, sir, they do.

Q. Do you have certificates for any of those points of delivery?

A. Not to my knowledge.

Q. By certificates, you understood I meant——

A. Yes, sir.

Mr. Gooch: All right, sir. I think that is all.

Cross Examination

By Mr. Carter:

Q. Mr. Echterhoff, that green system on what is now known as Commission Exhibit 1, is in fact an integral system, is it not? That is, a system which can operate unto itself?

A. What do you mean, "Operate unto itself"?

Q. Well, let me just describe it another way and we will get it clear. Aren't the pressures in the black system different from the pressures in the green system?

A. Yes.

Q. And in order for gas to get from the black into the green system, you have to turn a valve, do you not, or some kind of meter?

A. You can separate the two with a valve, but there is a measuring device or regulating device to let the gas flow.

Q. What I am getting at, Mr. Echterhoff, as Mr. Belvin told us, under oath that there were valves and regulators, regulating devices such that the green system could be completely closed off from the black system. Now, is that correct?

A. That is correct.

Q. That is what I meant when I talked about being an integral system. Now, in order for somebody to put black gas in the green line, they would have to turn a valve or other regulating devices, do they not?

A. Yes.

Q. You have been serving the Louisiana Power and Light Company without a certificate since 1951, have you not, at the Nine Mile Point?

A. That is correct.

Q. Were you in the courtroom when I asked Mr. Cassin about the green gas not flowing into the black line?

A. Yes, I was.

Q. And he gave truthful testimony when he said that, did he not?

A. Yes, he did.

Q. And that is because there is a difference in the pressure, the green pressure is lower than the black pressure, is it not?

A. That is right.

MR. CARTER: That is all.

RE-DIRECT EXAMINATION

BY MR. HARVIN:

Q. There is no contention by United in the proceeding pending before the Federal Power Commission that gas which goes originally from the field into the green line, flows back into the black line out of the state, is there?

A. No.

Q. But what about the reverse, is gas flowing from the black line into the green line?

A. Yes, it is.

Q. Which means that——

MR. CARTER: Objection to the leading.

THE COURT: Sustained.

BY MR. HARVIN:

Q. Will you tell the Court whether or not, in this system, in the New Orleans division, gas at any time flows from the black interstate line and passes into the green line?

A. Yes, sir.

MR. CARTER: Object to the leading.

THE COURT: Sustained, I think the Court understands that though.

BY MR. HARVIN:

Q. Mr. Echterhoff, in respect to Mr. Carter's questions about the green system being an integral, otherwise it could be closed off entirely, do you recall that line of questioning?

A. Yes, I do.

Q. Have you made studies in attempts to determine what would happen to your supply of gas to the New Orleans area if that green system were, in fact, closed off?

A. Yes, sir, we have.

Q. And what did they indicate?

A. They indicated an insufficient supply to serve the customers connected to that system and we would have a very critical situation develop.

Q. Including the Nine Mile Station?

A. Including the Nine Mile Station.

Q. And is that why inter-state gas is flowing into that system?

A. Yes, sir, it is.

MR. HARVIN: That is all.

THE COURT: Any further questions of this witness? You are excused, sir. Thank you very much.

MR. HARVIN: We have nothing further now, Your Honor.

THE COURT: All right, sir, fine. Thank you, sir.

MR. GOOCH: May it please the Court. Mr. Harvin has put in substantially everything—except—I think I have nothing more than the volumes I took the liberty of bringing down here with us and I don't have copies for everybody, but they all have copies that are referred to in the proceedings, the entire excerpts from the proceedings in both the certificate cases and the curtailment cases. I don't propose at this time to read them, and I would hope that in the recess, the Court will permit me to mark them individually as exhibits and then, having done so, offer them enmasse, with certificates from our secretary, certified that these are documents, and I agree with Mr. Carter that the Federal Power Commission, or its staff, does not necessarily agree with all of the testimony that is presented here. That the Commission has not had an opportunity to pass on it at all and the staff, as you will see, is cross examining those numbers, so I offer to show the status and the scope and the extent of the proceedings before the Commission, rather than to establish the truth as to what is stated.

THE COURT: Accepted with those limitations, sir, and let them be filed.

MR. CARTER: On the basis of that limited offer, Your Honor, we would have no objection to it.

THE COURT: All right, sir, fine.

Thereupon the exhibits that were to be marked at recess, were received into evidence and filed with the Clerk of Court.

MR. GOOCH: I also brought, if the Court please, samples, also certificates from the secretary of various producers, certificates authorizing the sale of gas in inter-state commerce which I believe, if I am not mistaken, Mr. Belvin

will be able to tie into the black system. I also brought certified copies of the certificates on portions of the black line to establish that they are jurisdictional by the Federal Power Commission. So these would be offered to show that the producers of the black line jurisdiction, is jurisdictional under the black line.

THE COURT: Admitted.

Thereupon the exhibit hereinbefore described was received into evidence and filed with the Clerk of Court.

MR. GOOCH: I also brought three orders of the Commission which may be germane to the proceedings. I brought a certified copy of the Commission's order #431 which has previously been offered into evidence. I also brought a certified copy of the Commission's order and docket R-405 which has not been mentioned heretofore and I don't know if it becomes marerial or not, I won't go into it unless it does. It just happened that the secretary lumped these together and a copy of the Commission's order which did permit United's curtailment plan of the tariff provision which will go into effect—not the one that Mr. Carter——

THE COURT: The winter plan?

MR. GOOCH: The summer one.

THE COURT: Permitted the winter plan to go into effect, is that not right?

MR. GOOCH: No, sir. The previous—if, I may have lost track of the exhibits, the one permitting the winter plan did go into evidence. This is the order that permits the one filed in February. I believe that this would be a complete summary of the order entered to date by the Commission in the curtailment proceeding.

THE COURT: There being no objection, they are admitted and subject to identification by counsel.

MR. CARTER: We have no objection, we would simply have an observation for the Court's benefit that that last order that counsel was talking about has no relationship to Louisiana Power and Light.

MR. GOOCH: If the Court please, I am not sure that I can accept that observation but the orders speak for themselves.

THE COURT: It will be admitted subject to that limitation. Is that all, Mr. Gooch?

Thereupon the exhibits as herein before described were received into evidence and filed with the clerk of court.

MR. CARTER: Well, Judge, they have been presenting their very brief case for 3 hours and 6 minutes. I would like to get a drink of water, if I may, and then commence and I will assure you that we will be rather diligent and equally brief.

THE COURT: All right, sir, fine. We will have a ten minute recess.

(Recess)

THE COURT: Proceed, Mr. Carter.

MR. CARTER: Call Mr. J. M. Wyatt.

J. M. WYATT

called as a witness by Louisiana Power and Light Company, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CARTER:

Q. Give us your full name and address, please sir.

A. Jack M. Wyatt, 102 Berkeley Drive, New Orleans, Louisiana.

Q. By whom are you employed?

A. Louisiana Power and Light Company.

Q. What is your job?

A. Senior Vice-President.

Q. How long have you been with that company?

A. Thirty-three years.

Q. What were you before you were Senior Vice-President?

A. Vice-President.

Q. And what were you before that?

A. Division Manager.

Q. And before that?

A. Assistant Division Manager.

Q. All right, and then you went all the way down the line to a low beginner, is that right?

A. Correct.

Q. All right. Now, as Senior Vice-President, what part

of the company's business operations is under your jurisdiction?

A. I have responsibility for treasury and accounting, rates and research, offered services, rates—power, production of power.

Q. All right.

A. I believe that is about all.

Q. Now, for a moment, just some brief questions about the company, the Louisiana Power and Light Company. You have said that your complaint—what you have said in your complaint is that the Florida Corporation has its principal place of business in Louisiana, is that correct?

A. That is correct.

Q. And it is engaged in the generation and transmission and distribution and the sale of electric power and energy?

A. It is.

Q. And you operate in 46 of the 64 parishes of Louisiana?

A. We do.

Q. Now, do you have an electric generating plant known as the Sterlington Station in Ouachita Parish?

A. We do.

Q. And do you have another electric generating plant or station known as Nine Mile Point Station in Jefferson Parish, Louisiana?

A. We do.

Q. Jefferson Parish is down in south Louisiana, near the Gulf Coast?

A. Right, right next to New Orleans.

Q. All right, now how do those stations operate, Mr. Wyatt?

A. We use natural gas to fire our boilers from which steam is made and then steam is in turn run through turbines from which we generate electricity.

Q. All right. First of all, describe the Sterlington Station for us, how many units does it have?

A. We have four units operating at *Sterlington* for a combined capacity of 333 megawatts.

Q. All right, sir. And when were those generating units constructed?

A. Between 1928 and 1958.

Q. When those units were constructed, Mr. Wyatt, was any provision made for the use of any fuel other than natural gas?

A. There were no provisions made for using other than natural gas for fuel.

Q. All right. Do you have any provisions, right now, for any fuel other than natural gas?

A. We do not at Sterlington.

Q. All right. Now, describe the Nine Mile Point Station for us, how many units are there?

A. We have four units at Nine Mile, ranging in capacity from 74 megawatts to 750 megawatts and they were installed from 1951 through 1971.

Q. At 750 megawatts, it would be the same as 750 thousand kilowatts, correct?

A. Correct.

Q. All right. Now, when those units at Nine Mile were constructed, was any provision made for operating on any fuel other than natural gas?

A. Yes, we made provisions for operating the plant on an emergency basis using #2 oil that had the capacity to run the plant on full load for about 36 hours, a day and a half or thereabouts.

Q. So you have a capability at Nine Mile Point on an emergency basis to operate up to 36 hours on #2 fuel oil, is that right?

A. That is correct.

Q. Now, have you any contract with United for a supply of gas to the Sterlington Station?

A. We do.

Q. Mr. Wyatt, have I asked you to furnish me with those contracts?

A. You have.

Q. I am handing you now, a group of contracts and ask you to examine those and tell us if those are the contracts that LP&L has with United for gas to the Sterlington Station?

MR. CARTER: Your Honor, I am not going to mark those originals with the leave of the Court. I am going to substitute zeroxed copies, these are our original records.

THE COURT: All right, sir.

THE WITNESS: These are the contracts as between Louisiana Power and Light Company and United Gas Pipeline Company for the Sterlington Plant.

BY MR. CARTER:

Q. Mr. Wyatt, to hustle along with this, is your base

contract for the gas at Sterlington #1 dated February 20, 1956?

A. It is.

Q. I mark that contract as LP&L—Wyatt #1A and Mr. Wyatt, what is your next contract in the Sterlington pile?

A. Amendment agreement dated March 29, 1963.

Q. I am marking that contract as LP&L—Wyatt #1B, and what is your next contract in the Sterlington group?

A. It is an amendatory agreement between United Gas and LP&L dated November 30, 1966.

Q. I mark that contract as LP&L—Wyatt #1C. Do you have further contracts in the Sterlington group?

A. I have another contract amending the basic contract dated December 2, 1969.

Q. All right, I mark that contract LP&L—Wyatt #1D and do you have another contract, as a matter of fact, dated that same date with Sterlington?

A. I have two more contracts dated that same date, however, they are not in regard to the basic contract.

Q. All right, please identify those two contracts.

A. If I may, I have a stand-by gas sales agreement, basic agreement, dated May 5, 1967 which was amended on December 2, 1969.

Q. Have we—you haven't gotten to that stand-by sales agreement yet, I don't believe. I will mark that one as LP&L—Wyatt #1E. Now go ahead from there, what is your amendatory agreement you mentioned?

A. The amendatory agreement to the stand-by sales agreement, which is dated December 2, 1969.

Q. All right, and that is being marked LP&L—Wyatt #1F. Now, do you have any further agreements from Sterlington?

A. I have a transportation agreement between United Gas Pipeline Company and Louisiana Power and Light Company dated December 2nd, 1969.

Q. I am marking that exhibit LP&L—Wyatt #1G. Now, are those all of the contracts that you have with United for the Sterlington Plant?

A. They are.

Q. All right, sir. Do you also have a contract with United for your supply of gas at the Nine Mile Point power plant?

A. We do.

Q. Is that your contract at Nine Mile Point with United that I have just handed you?

A. This is our sales agreement between United Gas and Louisiana Power and Light Company for Nine Mile Point plant dated May 6, 1968.

Q. All right, I am marking that contract LP&L—Wyatt #2.

MR. CARTER: Your Honor, at this time I am going to offer these contracts into evidence, LP&L—Wyatt #1, A through G and LP&L—Wyatt #2. These are contracts, which I might say for the record, that are attached to the complaint in this matter and they are obviously agreements that United has available to them, the other contracting party.

THE COURT: Admitted, allowing also the condition that the originals may be withdrawn and substituting photostatic copies.

Thereupon the exhibits marked LP&L—Wyatt No. 1, A through G, and LP&L—Wyatt No. 2, were received into evidence and copies will be made and filed with the clerk of court.

BY MR. CARTER:

Q. Now, Mr. White, what is the purpose and use made by Louisiana Power and Light Company of the gas supplied by United at Sterlington?

A. We utilize the gas to fire our boilers from which steam is made and therefore generate electricity.

Q. All right, and is that the only use of that gas that is made by LP&L?

A. That is the only use of the gas at Sterlington, yes, sir.

Q. All right. What is the use made of that gas by LP&L at the Nine Mile Point?

A. The same use is made of it, to fire our boilers from which we make electricity.

Q. And is that the only use?

A. Only use, yes, sir.

Q. Now, Mr. Wyatt, would the curtailments proposed in the FPC proceedings that you have heard about this afternoon here, proposed by United reduce the amount of gas

to which LP&L is entitled under its Sterlington and the Nine Mile contract?

A. It would—they would.

Q. In the discovery proceedings in this matter, I have identified a document as LP&L—Belvin #5, which is a series of calculations with the heading "Non-compensatory Sales, Twelve Months, July 31, 1970," and I ask you if that document has come to your attention?

A. This document has come to my attention.

Q. Mr. Wyatt, do you know what that document purports to show?

A. It purports to show——

Mr. Harvin: May it please the Court, it doesn't seem to me that this document has been proved for application of his contentions——

Mr. Carter: That is——

Mr. Harvin: For that reason, due to the fact that this is just hearsay, as far as he is concerned——

Mr. Carter: Your Honor, I asked it precisely for the purpose—the purpose of my question is to have Mr. Wyatt to testify what he understands that document to be. I hear a proposal by United to alter the rates to certain customers that they considered non-compensatory, including LP&L.

Mr. Harvin: If that is the case, we also have to object to its being totally irrelevant to the jurisdictional issue here.

The Court: The objection is overruled; it will be allowed.

By Mr. Carter:

Q. Mr. Wyatt, if you don't remember the question, and that is very likely, I will ask it again. What do you understand that document to be and how did it come to your attention?

A. It came to my attention as a result of a conference that was held and as a result of the conference, this information was made available to our people, from which I got the copy that came across my desk.

Q. And this conference was the one that Mr. Cassin earlier testified about in Washington?

A. In Washington, yes.

Q. In Washington?

A. Yes, sir.

Q. And these figures were proposed by United, so far as you know?

A. They were. I was under the impression and told that they were proposed by United.

Q. And Mr. Wyatt, what affect would that proposal have on LP&L?

MR. HARVIN: I think the witness just indicated that he was told something about it and I renew my objection as being strictly heresay as far as he is concerned and it has not been proven. It was given to him, as I understand, in some form or fashion.

MR. CARTER: We are trying not to play games, Judge, and get along with things but I will——

BY MR. CARTER:

Q. Mr. Wyatt, do you know a Mr. Haslanger?

A. Yes.

Q. Who is he to your knowledge?

A. He is President of the United Gas Pipeline Company.

Q. And do you know, of your own knowledge, whether or or not Mr. Haslanger met with any personnel representing Louisiana Power & Light Company in connection with those figures?

A. Yes, I do. He met with our President and the President of the Middle South Services.

Q. All right, and do you know what was proposed by Mr. Haslanger with respect to those figures?

MR. HARVIN: Your Honor, if this gentleman didn't meet with Mr. Haslanger, I doubt if he can give testimony of what Mr. Haslanger may have said, that would be heresay.

THE COURT: I am going to overrule the objection.

THE WITNESS: I understand that the proposal made was that the companies represented on this sheet, and particularly Louisiana Power and Light, at N.O.P.S.I. were to accept this as a suggestion for increasing the cost per kilowatt hour to them from their present contract and in our particular case, even though the average, as shown on this sheet, is 6.67 cents per MCF, ours at Louisiana Power and Light Company is slightly higher. It is about 6.8, so we calculated, as increase over our present gas contract.

Q. All right, sir. Do you know that this was submitted within the frame-work of the CP71-89 proceeding, the one that is known as the certificate proceeding?

A. That is my understanding.

MR. CARTER: So that this will not be puzzling, or misleading, Your Honor, I would ask leave—for permission to renumber this exhibit as LP&L—Wyatt #3 and offer it into evidence at this time.

MR. HARVIN: To which we register our objection on the grounds that it has not been proved that this witness has any personal knowledge or is in the position to identify the exhibit. That his testimony is completely heresay from a person other than anyone at United—that no one at United ever spoke to him about it and likewise it is irrelevant to the jurisdictional issue.

THE COURT: Overruled, it is admitted.

Thereupon, the exhibit marked LP&L—Wyatt No. 3, was received into evidence and filed with the clerk of court.

BY MR. CARTER:

Q. Mr. Wyatt, I show you a document already in evidence that has been presented as Pennzoil United exhibit #14 on United Gas Pipeline Company, a letter dated May 14, 1971, consisting of seven pages signed by William B. Cassin with revised gas tariff attached to the back of it and ask you if you have ever seen that document before?

A. Yes, I have.

Q. Mr. Wyatt, are you aware that that document is a proposal by United in the FPC proceedings?

A. I am.

Q. And are you aware of what effect that document or that proposal would have on LP&L?

A. Well, it would have a very great effect on LP&L. In the first place, it would increase its rates that we are paying for gas under our contract with United. It changes the order of priority, unless the rates are increased, among several other things.

Q. All right. Of course, all of your answers assume that that would be so if it were made applicable?

A. If it were made applicable.

Q. And which we are trying here to see that it is not applicable, right?

A. Yes, sir.

MR. CARTER: We won't have to argue about this one, Your Honor, because it is theirs. I tender the witness.

CROSS EXAMINATION

BY MR. GOOCH:

Q. Sir, Mr. Wyatt, I have a couple of questions. Louisiana Power and Light—would you tell the Court whether or not that also is a jurisdictional company subject to the jurisdiction of the Federal Power Commission?

MR. CARTER: Objection, he is not qualified to answer that.

MR. GOOCH: I will establish it another way, then Your Honor.

THE COURT: All right, sir.

MR. CARTER: I would say this, Your Honor, that if Mr. Gooch would like to stipulate, Your Honor, that Louisiana Power and Light Company is in a limited manner with respect to some of its wholesale sales with retail sales subject to jurisdiction of the Federal Power Commission.

MR. GOOCH: I'm afraid that won't quite get it, Your Honor.

THE COURT: All right, sir.

BY MR. GOOCH:

Q. Mr. Wyatt, with regard to Pennzoil exhibit #14, the matter that Mr. Carter was just asking you about, you testified that this would have serious impact on Louisiana Power and Light if permitted to go into effect, isn't that correct?

A. Yes, sir.

Q. Has the Federal Power Commission permitted that to go into effect?

A. They have not.

Q. Are they giving you an opportunity to be heard on that before it can go into effect?

A. Yes.

Q. Now, Mr. Wyatt, after June, 1971, does your company expect to be able to off-set any foreseeable gas curtailment by burning oil?

A. Possibly, after June, slightly after—don't tie me

down to June but sometime this summer we expect to have facilities at our #6 unit at Sterlington to burn oil on an emergency basis.

Q. Have you reported to the public that after June of 1971, the company expects to be able to offset any foreseeable gas curtailment by burning oil?

A. We have not——

MR. CARTER: Now, Your Honor, that would be a terribly distorted report—the witness has just testified.

BY MR. GOOCH:

Q. All right, sir, I now have a certified copy of the registration statement filed by Louisiana Power and Light Company before the Security Exchange Commission which I would like to have Mr. Wyatt, now, to read to the Court. I show you first, Mr. Wyatt, the certificate of Mr. Charles A. Moore, Deputy Records Officer, United States of America Securities and Exchange Commission. I turn now to a document within that certification which says on its cover "Louisiana Power and Light Company" with a time stamp received April 7, 1971. I ask you now to read from page six of that document under fuel supply.

A. "The company's primary fuel supply is natural gas. Two companies—three major generating stations—are outfitted to burn on oil as a stand-by fuel and the third station is presently being modified to allow the burning of oil as a stand-by fuel and this modification is scheduled for completion by June, 1971. The company has firm contracts for adequate supply of gas for all generating capacities, which will be operational prior to 1974, three thousand four hundred and four megawatts, which contracts have various expiration dates from 1978 to 1993. During the winter of 1970-71, gas was curtailed to some extent by one supplier who supplied gas to approximately five hundred and fifty megawatts of generating capacity. After June 1971, the company expects to be able to off-set any foreseeable gas curtailment by burning oil."

Q. All right, sir. Is that the end of that?

A. No, not quite, one more sentence.

Q. All right.

A. "The supply of fuel for the generating units that will become operational in 1974 and thereafter is being negotiated at this time."

Q. Now, All right. Have you read to the Court the representation made by Louisiana Power and Light in a registration statement filed with the Security Exchange Commission with regard to fuel supply?

A. I have.

Q. All right, sir, now, Mr. Wyatt, do you recall when it was that United Gas Pipeline Company filed its curtailment plan for the summer of 1971?

A. I don't recall exact dates, I believe it was February 22 or somewhere about there.

Q. All right, sir, within the month of February?

A. Yes, sir.

Q. Mr. Wyatt, do you recall when this lawsuit was filed against United Gas Pipeline Company?

A. I don't believe I do.

Q. Mr. Wyatt, I have here what I believe is an accurate copy of the complaint filed in this suit. It appears to be signed by Andrew P. Carter and it indicates a verification, at least, of the 29th day of March, 1971.

A. This document does.

Q. The Court has very kindly handed me the original, would you look at the filing date on that?

A. March 31, 1971.

Q. All right, now have you read this complaint?

A. Yes, I have.

Q. Could you read that portion of the complaint which talked about the possibility of this curtailment program causing black-outs and brown-outs?

A. I am sure I did because I read the whole complaint. Yes, I see it here.

Q. Look at paragraph seven.

A. I see it.

Q. Now, Mr. Wyatt, wouldn't you say that a plan which would cause black-outs and brown-outs on Louisiana Power and Light system is a material fact?

A. Yes.

Q. And very significant?

A. Yes.

Q. Mr. Wyatt, let me ask you again to look at the registration stamp filed with the Securities and Exchange Commission. If you will follow me through, you will see that the

first filing, according to the time stamp, was on February 19, 1971.

A. Yes.

Q. Which was prior to the time that United Gas Pipeline Company filed their summer curtailment program, isn't that correct?

A. Yes.

Q. Now, let's look at what you say on fuel supply. Would you read that over and tell me whether it differs in any respect at all, if you remember it, with what you read to the Court in the last filing?

A. It appears to be the same.

Q. All right, sir. Now we know that the suit was filed at the end of March, right?

A. Yes, sir.

Q. In which it was alleged, the significant and material fact that there may be black-outs and brown-outs, isn't that right?

A. Yes, sir.

Q. And then we looked at the prospectus by which Louisiana Power and Light Company offers securities to the public, a verified filing with the Securities and Exchange Commission in April.

A. Yes, sir.

Q. April 7th, now that would be after the time that this suit was filed?

A. Yes.

Q. But the fact that the significant and material possibility of black-outs and brown-outs was not called to the public's attention, was it?

MR. CARTER: I think, Your Honor, that this is a waste of time and I object to the waste of time and the Court's— it is pretty obvious here that Louisiana Power and Light Company is not going to assume any registration statement that it is going to lose this suit. We are expecting to get the gas we are entitled to under the contract. We are certainly not going to suggest to the SEC or anybody else that we are not going to get it.

THE COURT: Overruled.

BY MR. GOOCH:

Q. All right, sir. Now let's look under such things as litigation and regulations in the registration statement

filed by the SEC. Mr. Carter has just said that they were not going to assume they would lose any suits. Would you show me anywhere in this registration statement filed in April, where Mr. Carter even disclosed to the public that there was a suit pending which could cause Louisiana Power and Light company to suffer brown-outs and black-outs if this allegation were true?

A. If I understand your question, I don't see why it would be necessary to notify, because there was nothing involved here that would cause brown-outs or black-outs on this suit.

Q. Nothing involved in the suit?

A. In the suit that I am looking at here, if I understand your question.

Q. My question is; is the suit that we are here in Court for today, do you see that disclosed anywhere, to the public, that it is pending?

A. No, it is not in here.

Q. All right. Now, would you please look at the date of this certificate?

A. Yes.

Q. Will you tell the Court what that is?

A. May 19, 1971.

Q. Are you aware of the filing with the SEC that would either call to the attention the pendency of this suit to those who may be interested in purchasing Louisiana Power and Light securities or reporting any change in your fuel oil situation subsequent to May 19, 1971?

A. I am not aware of it.

MR. GOOCH: I would like to have this marked as a Federal Power Commission exhibit. I believe that is all the questions that I have at this time, Your Honor. I would like to offer this certified copy, SEC.

MR. CARTER: To which offer we object, Your Honor.

THE COURT: The objection is overruled. The document is admitted.

{ Thereupon the exhibit herein before described was admitted into evidence and filed with the clerk of court.

MR. HARVIN: I have a question, Your Honor.

CROSS EXAMINATION

BY MR. HARVIN:

Q. Maybe I didn't hear you fully. I have some trouble

about that sometimes, but it did strike me that you gave the Court a very complete picture about the gas supply situation at the Nine Mile Power station, didn't you?

A. I thought I did, maybe I don't understand your question.

Q. Oh, you identified a contract that you had with United Gas Pipeline Company for some gas at the Nine Mile Power station but I believe you have other substantial gas contracts to supply the Nine Mile Power station, don't you?

A. We have another contract with another supplier, yes.

Q. That is a contract with Texaco?

A. Correct.

Q. A so-called non-jurisdictional contract?

A. Yes.

Q. Not subject to the regulations of the Federal Power Commission?

A. Correct.

Q. And how many such contracts do you have with Texaco?

A. We have two, one which is in effect at the present time.

Q. And in the interest of completing the picture as to the gas supply for the Nine Mile Station, did you bring those contracts with you, Mr. Wyatt?

A. I did not bring the official documents, no, I did not.

Q. Do you have copies of them, whether they are official documents or not? If so, would you produce them for us?

MR. CARTER: I would object to producing them, Your Honor. First of all, there is only one contract that LP&L has in effect with Texaco, and as to that contract, I would object to our producing it, principally for the reason that it is not relevant here, but apart from that, and more important, is that the contract has a stipulation from Texaco as to its confidentiality and the Texaco people are here and they have an attorney in the back of the room, because the Federal Power Commission's general counsel requested that they be here and I would think, therefore, that they can speak for themselves on this subject and more clearly and elaborately than I can, but we object as far as Louisiana Power and Light Company is concerned, the disclosing of the contract with Texaco, because it is irrelevant here.

MR. HARVIN: They claim they are in here and have jurisdiction in this Court, as the basis for getting emergency

relief, because as the impact of the curtailment program, Your Honor. I think this all goes to that. We are operating under restraint right now and we have never really had an opportunity to have a hearing on the premise that these people would be in serious difficulty without our gas. It has just been disclosed that they have other alternates for fuel as well as the one I have been inquiring about now.

THE COURT: Was LP&L requested to bring this, was there any attempt of discovery or——

MR. HARVIN: We made no formal request, Your Honor, but if the witness has it here, we would like to make a request now that he produce it.

MR. CARTER: Your Honor, they made not only no formal request, they made no informal request and this is the first we have heard of this from United.

MR. HARVIN: I have not——

MR. GOOCH: Excuse me, Mr. Harvin, I did request Texaco to have the contracts within the range of the Court's power, in the event that it became material and the Texaco people did appear with it, as I understand it. I do not believe that Mr. Carter—my understanding of the situation is not the same as his. I understand that Texaco had told him of that request, is that not true?

MR. CARTER: Texaco's attorney advised me yesterday that the Federal Power Commission was after them to produce their contract and I said to them, "If you have to produce your contract or feel that you do have to break the confidentiallity of it, then we wish for you to bring your contract with you, between you and United, that shows the restrictive nature of your contract whereby the gas is not to be placed in inter-state commerce." Upon our saying that to them, we had no further communications with them, with Texaco's attorney.

THE COURT: Well, I would like to hear from Texaco's attorneys.

MR. PURLEY: Your Honor, my name is Daniel Purley, and I am an attorney representing Texaco from New Orleans, Louisiana. I represent the southeast region which includes the states of Louisiana, Florida and other states. This point was brought to my attention very late Tuesday evening and yesterday, which was Wednesday. Now, our position is very simply this and we weren't apprised of it and I so advised our manager. There is no question about what Mr. Carter has said concerning our position, with re-

spect to any of our industrial gas sales contracts. We consider them to be highly confidential and of a proprietary nature. The gas sale that is in question here involves a solely owned Texaco pipeline system. There is no contamination of that gas that is delivered in that system to LP&L with black gas, green gas, purple gas, or whatever color of the rainbow you might have here. The point that I am making is, that this contract is based upon economic analysis and our expertise in the industrial market, and as a result of that, we consider that if this contract is divulged to any party outside of the contracting parties would jeopardize our competitive position in the industrial market. For that reason, we take the position that our contract is totally irrelevant and immaterial to this hearing, secondly, that if the Court should determine that there may be some—that this contract may have some bearing on this proceeding, then we would move that the Court consider what portions of that contract is relevant and material and to issue a protective order, and would be binding upon United's attorneys, the Federal Power attorneys and other attorneys of proceeding, whereby they would not advise their—the individuals that they represent, and the agencies that they represent, of the contents of that contract, and this court so direct that if that part of the contract becomes a part of the record, that it not be made available for public scrutiny, and what happened in connection with the request of the Federal Power Commission, they were simply told this; that if they would tell us possibly what provisions of the contract that they wanted, there are some that we could possibly stipulate to, that would not get into this area. For example, there are definitions in the contract, the delivery point, the quantities of gas that are sold under that contract, are subject to reports that we file with the Department of Conservation in the state of Louisiana, but beyond that, this contract is a highly confidential and proprietary document and we do not want to see this contract released to anybody and not necessarily be a part of this proceeding. This, we don't think, is material. Now, even with respect to that segment of the contract that we feel may possibly be released, we would not release that without the concurrence of Louisiana Power and Light and this is done where the provision is in the contract or not in the contract. This is of custom in the trade with us and probably with most producers and after

talking to Louisiana Power and Light, it was their position that they wanted no part of the contract given to the Federal Power Commission, which we are totally in accord with.

THE COURT: All right. I will hear from other counsel.

MR. GOOCH: Well, Your Honor, that is satisfactory with me. Personally I would be happy to hand it to the Court in camera and let the Court look at it. I don't care about seeing it myself and I have no objection whatsoever if they would hand the contract to the Court and let the Court look at the volumes and——

THE COURT: Could we have a stipulation——

MR. GOOCH: I just want to add, so there won't be any misunderstanding about that, I am sure that Mr. Purley understands, under section 8 of the Natural Gas Act, we could have compelled Texaco, the natural gas company is subject to our jurisdiction, but we do not want to do that and we don't intend to do that. I don't particularly care to see it, but I would like the Court to see it. I do not ask that it be made a part of the exhibits, I won't ask that they make it a part of the public record. I don't ask anything other than the—hand it up and let the Court look at it and determine whether the—what the volumes are and so forth, whether they are material to this case, and then work out, in camera, with Texaco and Louisiana Power and Light and the Court without our presence, as to what portion should be admitted and included in the record.

MR. PURLEY: Your Honor, may I say this.

THE COURT: Yes, sir.

MR. PURLEY: In response to that, assuming Mr. Gooch's position is correct, still the rule that I have outlined with respect to the materiality and the need for protective orders would still apply, notwithstanding what our posture may or may not have been before the Federal Power Commission. That is a right afforded to us under the Federal Rules. My point is that it is not material, the system is in no way jurisdictional——

THE COURT: Well, we don't have your system, we have somebody else's system. We are not worried about your system.

MR. HARVIN: We have no objection whatsoever, Your Honor, to his handing and your examining it in camera.

THE COURT: Well, is there any portion other than the amounts of gas deliverable under the contract, is there

any other portion in that——

MR. HARVIN: I don't care about the prices or anything like that.

THE COURT: All right.

MR. HARVIN: I do have a couple of questions more, though, I want to find out about this, just a little bit more about this arrangement before we wind up on that.

THE COURT: Could we have a statement from Texaco and LP&L, just to the amount of gas deliverable under the contract—under the terms of the contract.

MR. PURLEY: Your Honor, I really don't know.

THE COURT: I don't mean the statement here, just a written statement filed in evidence.

MR. CARTER: Yes, Your Honor, we are perfectly willing, Your Honor, we don't care a thing about it ourselves. Texaco are good people and we have a relationship with them and we are going to honor it, so that is the reason why we are taking the position that we have no objection at all to either the Court seeing the contract or, as you have now suggested, Your Honor, submitting to you that portion of the contract with respect to the amounts. We are certainly willing to do that.

THE COURT: All right, sir.

MR. PURLEY: Your Honor, our position is a little bit more stronger than Mr. Harvin's position, but I believe that we could work out a stipulation, as long as we stay away from the very key provisions of that contract.

THE COURT: All right, sir. I think just the amounts; the delivery formula, whatever it might be, if we could get that part I think it would be sufficient.

BY MR. HARVIN:

Q. Mr. Wyatt,——

THE COURT: Just a second, we probably should have a time limit on when that would be produced. Mr. Carter, I will let you take care of that.

MR. CARTER: A time limit on what, Your Honor?

THE COURT: When that should be produced, in other words, I sort of want to get started on this thing.

MR. CARTER: Well, if Texaco can—if we can get together with Mr. Purley——

THE COURT: If I can have it in seven days, that is fine. I am out of town for the next week.

MR. CARTER: Right, easily.

MR. HARVIN: Your Honor, I don't want any requests without getting some stipulation together like that, to delay this thing because we are still under restraint in this matter.

THE COURT: Yes, sir.

MR. HARVIN: And Mr. Carter's standpoint is fine, he can let it drift along.

THE COURT: No, Mr. Carter is not letting it drift along. This is as soon as the Court can get to it, that was the limiting factor here. The reason we are here and continuing tonight is that I have to be out of town tomorrow and all next week.

MR. HARVIN: Yes, sir.

By MR. HARVIN:

Q. Mr. Wyatt, this first contract that you mentioned with Texaco is for a regular and continuing supply of gas at the Nine Mile Station. It is already in effect, isn't it?

A. Yes, it is.

Q. And you mentioned another contract with Texaco——

A. That is not in effect.

Q. It is not in effect yet?

A. Yes.

Q. But it has been executed between you, has it not?

A. Yes, it has.

Q. And it is to become in effect to supply additional gas to you in the event that you are pinched by the curtailment program of United—that United has or if you have other gas shortages, isn't it.

A. No, not to my knowledge.

Q. What is the triggering effect?

A. Additional generating units in the future.

Q. So, if you have additional requirement, there at Nine Mile Station, they will be supplied by this contract?

A. Additional generating unit requirements, yes, not just additional requirements.

Q. All right.

MR. HARVIN: We would like to request that the essential terms of that contract also be provided, Your Honor, because we think that long-term contracts are pertinent here.

MR. PUGLES: Your Honor, I am making the same objection as I raised before in this concern, that is on the question of materiality.

MR. CARTER: Your Honor, we are not talking about a contract that is not even in effect at this time. We are talking about a contract for future execution, based on something that must happen in the future and heaven only knows how long in the future. I think we are going terribly far afield when we get to that point, as well as the fact, Your Honor, that it is not relevant.

MR. HARVIN: Well, we would like the opportunity to see whether it is relevant or not and also to see what its terms are as to how it comes to effect, rather than just having an off the record— or off the witness stand comments made about it, Your Honor.

THE COURT: Could we make the same sort of stipulation to add to the information in this contract, the conditions on which it becomes effective.

MR. CARTER: Yes, Your Honor, we will do so at the Court's request.

THE COURT: All right, sir, fine.

MR. PUBLEY: When it comes into effect, Your Honor, I am sorry?

THE COURT: The provision that we have in the other contract—the same provision—that add to that the terms on which it becomes—the time of the provisions which provide when it is to become effective. In other words, what it is suppose to supply to fulfill the conditions that have just been brought up by whether the only purpose of it is to fire additional generators. So if we could have that provision along with the provision of the amounts, that is what we want, sir.

BY MR. HARVIN:

Q. Mr. Wyatt, referring to the next exhibit, the Commission's exhibit #1, which was the——

MR. GOOCH: If Your Honor, please, I think I have that marked wrong. One was a long time ago, this must be around 21 or so for the Commission, it is 21. Forgive me for interrupting.

THE COURT: That is all right.

BY MR. HARVIN:

Q. Referring to the Commission's exhibit #21, the certified copy of LP&L's registration statement with prospectus filed as late as April 7, 1971, that prospectus dated April 6, 1971 and filed April 7, 1971, was the one in which LP&L

stated "After June 1971, the company expects to be able to offset any foreseeable gas curtailment by burning oil", was it not?

A. That is what that says, yes, sir.

Q. And you said, I believe, that you were familiar with the petition or complaint that your lawyers filed in this case?

A. Generally so.

Q. Those petitions and complaints, which were carried first to Judge Dawkins, seeking restraint and then expartiated to Judge Wisdom, seeking restraint, contained no statements whatsoever about your capacity to fuel your plants by burning oil after June, 1971, as is contained in that registration statement, do they?

A. They do not, but I think we best explain to the Court the circumstances under which we can burn oil, to be sure that everyone understands it because we make reference to after June, that Sterlington would be able to utilize oil in the emergency basis for one unit, not four but one. We also have provisions at Nine Mile for emergency burning of oil but strictly emergency, not on a continuing basis.

Q. For up to 36 hours?

A. Yes, sir.

Q. Now, that is what you indicated in your complaint, but that is not the way it is stated in your prospectus, was it?

A. I would say that that is not all—all that I just said was not in the prospectus, no.

MR. HARVIN: Thank you, that is all.

THE COURT: Is this all for this witness?

MR. CARTER: I think so, Your Honor.

THE COURT: You are excused, sir, thank you very much.

MR. CARTER: Call Mr. John Nelson as an adverse witness.

JOHN NELSON

called as an adverse witness by Louisiana Power and Light Company, and having been first duly sworn, testified as follows:

CROSS EXAMINATION

BY MR. CARTER:

Q. Give us your full name and address, please?

A. John C. Nelson, Houston, Texas.

Q. Mr. Nelson, by whom are you employed?

A. United Gas Pipeline Company.

Q. Mr. Nelson, how long have you been with that company?

A. Thirty-four years.

Q. And what is your job, right now?

A. Executive Vice-President.

Q. Are you the next man beneath the President?

A. Yes, sir.

Q. And what is your educational background, Mr. Nelson?

A. I have a bachelor and a master's degree in civil engineering.

Q. You are an engineer then, by education, and also by your work, is that correct?

A. Yes, sir.

Q. Mr. Nelson, as Executive Vice-President, do you have a good general knowledge of the proceedings that have been characterized here as the curtailment proceeding in the certificate proceeding of United before the FPC?

A. Generally, yes, sir.

Q. Are you familiar with this so-called non-compensatory rate proposal that was testified about earlier, Mr. Nelson, in which I identified in evidence here as LP&L—Wyatt #3 and also it was LP&L—Belvin #5? Are you familiar with that document? Are you familiar with that non-compensatory rate proposal?

A. I am not familiar with this page, Mr. Carter. I have seen some figures similar to this.

Q. Well, without making any effort to remember those exact figures, let me ask you if you are aware that United had made such a proposal as is indicated by those figures with respect to those companies and in that question, to be fair to you; I am not asking you if each and every number over there is correct. I am only asking you if the proposal is correct insofar as it relates to those companies and indicates an increase of approximately six and a percentage point?

A. No, sir, my opinion—this is not a proposal for these companies and as I recall these figures were brought out in one of the settlement conferences in Washington where the question was asked "If you took your latest rate filings, which is CP71-41, and allocated cost to these customers, what would their cost be and what would the deficiency be."

Q. That's what those figures are, is that correct?

A. That is what that is. I do not think it is a rate proposal.

Q. And did your company go to the companies on that list to discuss that proposal?

A. Not this proposal. Mr. Haslanger went to these companies and discussed the proceeding.

Q. Well, did not Mr. Haslanger go to these companies and discuss the proposal to increase the rates?

A. He discussed, I think what was said by the staff, that the settlement proposal—what was required to certificate the sale, namely compensatory rates. He also discussed—I was not there, of course, and I don't exactly know what he did discuss and I think what he said, it was his definition of the compensatory rate would be the gas cost in the field plus some reasonable transportation charge.

Q. And he was suggesting to them that the Federal Power Commission had indicated that it would want these increases to be effectuated if there were going to be a certificate issued?

A. Well, he—I don't know that he said that.

Mr. Gooch: I'm sorry, I am going to have to object to that. The Federal Power Commission has indicated nothing, anything that they indicate is indicated by virtue of an order issued publicly and available to all parties. I guarantee you that the Federal Power Commission doesn't ask Mr. Haslanger, whoever he is, to speak for them.

The Court: Sustained.

By Mr. Carter:

Q. Mr. Nelson, all of the parties were at that settlement conference, in Washington, were they not? At least they were invited there, were they not?

A. Yes, sir.

Q. Mr. Nelson, are you generally familiar with the filing made by United on May 14, 1971? The one that has been introduced in this proceeding?

A. In compliance with order #431?

Q. Yes.

A. Generally.

Q. Is it correct that that proposal seeks to place companies like LP&L in a position where, unless it agrees to an increase in rates to that paid by the Citygate customers at a one hundred per cent load factor, it would be then the first category to be curtailed?

A. Well——

Q. Look at the bottom of page 3 and on page 4, if you want to, to answer my question.

A. Could I have your question again, Mr. Carter?

Q. Yes, I asked you if it were correct that the proposal seeks to place LP&L or companies like LP&L, in a position where, unless they agree to an increase in the rates to that paid by Citygate customers at a one hundred per cent load factor, that it would be the first to be curtailed—or they would be the first to be curtailed.

A. Well, I think it says category #5.

Q. Yes.

A. If you were not—that would be the first order of curtailment, if you were not up to the one hundred per cent load factor at Citygate rate.

Q. So the answer to my question is yes.

A. Yes.

Q. Now, what happens if LP&L would agree to the rate increase?

A. Well, I presume, if they agreed to the rate increase, they would be in a different category.

Q. I see, then United would be willing to give them more gas?

A. Well, they would be willing to prorate the supply of gas that they have on that order of curtailment.

Q. Give them a better proration, is that correct?

A. Give them a different priority.

Q. All right. Does United have contracts with clauses that require United, whenever it has an interruption in service, to reduce the demand charges and/or to give a credit to the customer or substitute fuel burned by the customer as a result of interruption?

A. I am not too familiar with this kind of contract, Mr. Carter.

Q. Well, you are familiar enough to know that United does have such contracts.

A. I know we have some contracts, yes, sir.

Q. And would you check your document again, that you have in your hand, and look at 12.3 and tell us if United does not seek, thereby, to eliminate those obligations?

A. Where is this, Mr. Carter?

Q. 12.3, you will find it in the tariff, the revised tariff, Mr. Nelson.

A. Now, if you will tell me the question again.

Q. Yes, sir. I just wanted to ask you if that provision, in your revised tariff, would eliminate the obligations?

A. It was adopted by the FPC and the customers.

Q. The provision, if approved by the FPC, would relieve you of those obligations?

A. Yes, sir.

Q. And that would change the price that United would receive under those contracts?

A. No, sir, I don't believe it would. We are selling them gas at the same price.

Q. It would alter your price structure to the extent that you would not have to recompensate them for the relief of those obligations, Mr. Nelson, wouldn't it?

A. Well, to that extent it would.

Q. Now, Mr. Nelson, let's talk more broadly here about these proceedings that I asked you about earlier, the curtailment and certificate proceedings. It is my understanding, from among all of those books there, and I guess you would know more about that, that is has been brought out that United first became aware that it might risk the possibility of a gas shortage some time around May of 1968, is that your understanding of it?

A. No, that could be but I was thinking it was the fall of 1969.

Q. Well, don't you know that some of the witnesses testified—well, let me back up to refresh you a little bit. Do you know a man by the name of Mr. Miller, who represents Monsanto Chemical Company?

A. Yes, sir.

Q. He got some sort of discovery proceeding going to get into United's files or get some of their documents?

A. Yes, sir.

Q. And as a result of that discovery work, of Mr. Miller, didn't it then become known that, in fact, United first became aware in about May 1968 that there might be a shortage out in the future?

A. Well, I am not aware of that, Mr. Carter. I am not too much awarre of Mr. Miller's cross examination to begin with.

Q. All right.

A. Now, he might have found, in May of 1968, some of our so-called May version figures where you look forward and look at the shortage on a peak day but there might have been a temporary imbalance of supply.

Q. Well, by the good grace of Mr. Gooch, we have the whole record here, so we will have to call it to the Court's attention later. I won't dwell on it with you, but let me ask you this: You did take on new customers and increase deliveries to existing customers after May of 1968, did you not?

A. I think most of those were committed prior to that time, in 1966 and 1967.

Q. But you did take on new customers after May of 1968?

A. They came into being but the actual deliveries started, it was after that time.

Q. And you did increase deliveries to existing customers after May of 1968?

A. Yes, I believe we did, but again the commitments for the sale of that gas was made prior to May of 1968.

Q. In some instances?

A. Yes, sir.

Q. In some instances, though, the commitment was made after May of 1968, was it not?

A. I am not too familiar with that, Mr. Carter.

Q. You are familiar enough to know that in some instances the commitment was made or the contract was made and a commitment was made after May of 1968.

A. I know of one or two, yes, sir.

Q. Well, in your—well, first of all, isn't it correct and wouldn't you agree with me that new customers that come onto your system now, and during the past year or two, are paying rates higher than those who you might call embedded customers, customers who have been on your system for ten twelve or fifteen years prior to now?

Mr. Harvin: I hesitate to interrupt, Your Honor, but it seems to me, for some time now, we have been on matters which really don't have anything to do with jurisdiction.

Mr. Carter: This has a considerable bit to do with jurisdiction. If Your Honor will remember, the third point, and I would rather not say any more in front of this witness, but the third point that we talked about in the pretrial conference——

The Court: Well, the witness is under cross examination, the objection is overruled.

By Mr. Carter:

Q. Mr. Nelson, do you remember the question?

A. Yes. One of the sales that I remember, Mr. Carter,

is a jurisdictional sale and it is the same rate as all of the others and the other customer I think of is a very small increase in volume in existing industrial that come on at the same rate that he had had.

Q. Well, aren't your customers, in the past two or three years, being permitted—aren't you being permitted to charge them a higher rate than you were able to charge them prior thereto by the FPC?

A. Well, we are collecting—we have one rate case, 70-13, that is up—that has been settled we think. It has been up at the Commission—the Commission has not approved it yet so we are collecting rates now in effect under bond.

Q. Now, in your curtailment proceeding, as you call it, you are contemplating or you are proposing that you make no distinctions between your customers on the basis of how old they are, are you?

A. That is correct. We are not.

Q. And you are making no distinction in your curtailment proceeding as to what differentials in rate any of them are paying to you, are you?

A. In the proposal now?

Q. In your proposal in the curtailment proceeding, other than that category #5 you have just introduced. I will make that exception.

A. We are not.

Q. Except for that category #5 situation, you are making no distinction on the basis of any rate differential between customers?

Mr. Harvin: I hate to interrupt again, but the question was predicated on the curtailment proceeding and the category #5 Mr. Carter mentioned was in response to order #431 and not in the curtailment proceeding.

Mr. Carter: Your Honor, obviously the witness is making a reservation, because of that I was trying to help him to get his answer by making that distinction.

By Mr. Carter:

Q. Mr. Nelson, you and I understand one another now, do we not? I am asking you if you are making any distinction in the curtailment proceeding between your customers on the basis of how much they are paying?

A. No, we are not right now.

Q. Now, if you, therefore, make no distinction between

customers on the basis of their age and how much they are paying and no distinction other than these categories that you described in your filing, then if you were to curtail on the basis of those categories, you are going to be taking away gas from your old and new customers alike, are you not?

A. Are you following through and saying that the Commission has approved #431, all of the customers approved are filing under #431?

Q. Well, all of these questions have to assume, Mr. Nelson, that you are making the proposal on the basis that you will try to get the Commission to approve your proposal.

A. Yes, sir.

Q. So I am asking you the question, if under your proposal and if you get approval from the Federal Power Commission, you will not be curtailing your old and new customers just alike?

A. Unless they are in the same category.

Q. If they are in the same category.

A. We will curtail them alike.

Q. All right, Mr. Nelson, does United Gas furnish gas beyond Mississippi and toward the north of the country?

A. We sell gas to pipelines that take gas north of the Mississippi.

Q. Yes, sir, and beyond Mississippi, how far does United Gas take the gas?

A. United does not take it north of Mississippi.

Q. It does not take it north of Mississippi?

A. No.

Q. Do you have pipeline customers that take it north of Mississippi?

A. Yes, sir.

Q. All right. Being in this business, this gas business, as long as you have been, I suppose you are aware that the utility plants, like Louisiana Power and Light Company's plant in the north and eastern part of the country, rely principally for fuel on coal and oil, do they not?

A. Well, as I understand it, they have interruptable contracts with pipelines and their alternate fuel is coal and oil.

Q. Yes, but gas, to them, is alternate fuel, is it not, or stand-by fuel?

A. Well, when available.

Q. Their principal fuel, as I stated in my question, is coal and oil, is it not?

A. I don't believe so.

Q. You don't?

A. No, sir.

Q. Mr. Nelson, are you familiar with a map that has been produced by United and I think it has principally been produced in a smaller form by United, which map I have identified in this proceeding as LP&L—Belvin #2, so far?

A. Yes, sir.

Q. Now, in your past job history with United, have you worked at times in the transmission department?

A. No, sir.

Q. You have never been involved with the transmission?

A. Not with the transmission operations.

Q. I see. Mr. Nelson, are you familiar enough with this map to know what this green line system represents?

A. Yes, sir.

Q. What does that represent in your mind?

A. That is the old district #5 system, which was at one time an intra-state system.

Q. I see, and that is the system that is now, along with one out here in the Lafayette district, proposed by United for certification to the Federal Power Commission, is that correct?

A. And some small lines in Texas.

Q. Mr. Nelson, do you know enough about the system of United to be able to tell me if there is any gas that goes to that green system that is produced in any state other than Louisiana?

A. No, sir. There is no gas produced in another state, other than in Louisiana, going into that system.

Q. All right. Do you know—well first of all, does United have contracts with each producer that sells gas to you?

A. Yes, sir.

Q. Are you familiar, rather closely, with the sale activities of United?

A. From the producers standpoint?

Q. Well, from United's standpoint.

A. Well, you were asking about producers.

Q. Yes, sir, but I am now asking you for a moment, if you are familiar with the sale activities of your company.

A. In a general way, yes, sir.

Q. Now, do any of those contracts, that you have with

producers, contain what I refer to as a restrictive provision?

A. Yes, sir.

Q. That is provision that restricts the gas that they produce and sell to you to transmission delivery and consumption, wholly within the state of Louisiana?

A. The contracts that we have on the green system, the number of contracts that we have on the green system have provisions in them that does not allow us to take them out of the state.

Q. As a matter of fact, our friends that have now departed us, I believe, from Texaco, have such a contract with you?

A. Yes, sir.

Q. Up here on your Paradis line, don't they?

A. Yes, sir.

Q. That is the line that runs generally from this area over here that says Paradis, the green line that runs across your black line and then jets up past Ama and over toward Algiers?

A. Yes, sir.

Q. Isn't that right?

A. Yes, sir.

Q. And that gas amounts to roughly half of the total of that whole green system, doesn't it?

A. No, sir, I don't think so.

Q. Well, aren't they delivering about seventy million Mcf?

A. No, I think they are delivering more than that, Mr. Carter, but it likes a long way being half of the supply of the system. I think maybe nine hundred billion feet connected to the system.

Q. I am referring only to the green system.

A. Well, that is what I am referring to.

Q. According to my figures, that I am getting from you—from United that is—the net total delivered to the New Orleans area from the green system is about one hundred fifty-five million, sixty thousand nine hundred twenty-eight Mcf.

A. Per year?

Q. Sir?

A. Is that per year? What period of time is that?

Q. It says annual Mcf on here so I take it that is a year.

A. All right.

Q. And what I am asking you, is that don't you know that Texaco is delivering about seventy million of that total?

A. Yes, sir. I don't know what the exact figures are.

Q. And that is gas that is produced by Texaco in Louisiana, shipped through that green system, totally in Louisiana, delivered and consumed totally in Louisiana?

A. That is correct, yes sir.

Q. As a matter of fact, Mr. Nelson, none of the gas in that green system can possibly get out of the state of Louisiana, can it?

A. That is correct. By contract we couldn't take it out if we wanted to.

Q. Right. And you are trying to observe those contracts with those producers that are restricted, are you not?

A. Yes, sir.

Q. And that includes your own fellow subsidiaries, I call it that because I understand you are wholly owned by Pennzoil and that is Pennzoil Producing Company.

A. You are talking about——

Q. You have a contract with Pennzoil Producing, don't you? It restricts their gas, I should say.

A. What field is that, Mr. Carter?

Q. Well, Lirette.

A. Lirette is not restricted, we can take that inter or intra, or into the green system or into the black system.

Q. Don't you have two contracts, Mr. Nelson, and it is up to you which contract you are going to deliver under. You can take the gas and put it into the green system and you run to the intra-state contract and you can take it and put it into the black and it is under the inter-state contract, isn't that right?

A. I do not know that.

Mr. Harvin: Your Honor, I object. That was all covered by Mr. Cassin.

The Court: The objection is overruled. Proceed Mr. Carter.

The Witness: I don't know whether we have one or two contracts with Pennzoil.

By Mr. Carter:

Q. But you know that Pennzoil can deliver it to you and you can use it either into the green line, intra-state, or the black line-inter-state, is that correct?

A. Yes, sir.

Q. But you also know that they do not intermingle it, do they?

A. Well, I would suspect not. There are two meters there.

Q. Right. There are two meters there. One for the gas that is going into the green system and one for the gas that is going to the black system, isn't there?

A. I think so.

Q. Now, you do not put in any—I will call them intrastate producers, those with restrictive provisions—you do not put any of their gas into the black line, do you?

A. No, sir.

Q. Mr. Nelson, you know who Mr. Belvin is, don't you?

A. Yes, sir.

Q. He is an Executive Assistant to the President, is he not?

A. Senior Vice-President.

Q. Senior Vice-President. Mr. Belvin testified and I wanted to see if you would agree with him. I am quoting now from his testimony at page 19 of his direct, prepared testimony before the FPC where he said in answer to the question, "Why does this situation exist?" and I have to back that up a little bit to tell you that he said this before that, that there were two locations in our system where we are able, at times, to deliver a larger proportion of the customer's requirements than in other areas. These two areas are the New Orleans and Mobile-Pensacola areas and then the question came, "Why does this situation exist?", and I now quote his answer, "In the New Orleans area, this situation is due to the fact that the supply of gas for our customers in this area cannot be moved out of Louisiana or co-mingled". I repeat for emphasis "or co-mingled with other gas being moved out of Louisiana under the terms of our gas purchase contract". Is that a valid and truthful statement that Mr. Belvin made?

A. Yes, sir, it is.

Mr. Harvin: It seems to me, Your Honor, that to be fair with the witness Mr. Carter ought to point out that Mr. Belvin said, on deposition and he went on to explain that that wasn't exactly accurate.

The Court: Well, if the witness wishes to explain the Court will allow him to explain.

The Witness: Mr. Carter, let me, if I could, put that in

my words. We have producer contracts on the green system that have provisions in them that says the gas cannot be moved out of the state. As far as I know, there is no provisions in those contracts that says it cannot move gas from the black system into the green system and retain it and sell it in the green system.

By Mr. Carter:

Q. Mr. Nelson, do you agree that all of the sales of gas to United that go into the green line, now these are sales from producers to United, that go into the green line, are intra-state sales?

A. They are intra in that the provision says you cannot move it out of the state.

Q. And you have already told us that you abide by those provisions and honor those contracts?

A. Yes, sir.

Q. Correct?

A. Yes, sir.

Q. Mr. Nelson, let me clarify something and I probably won't want to ask another witness. I have an idea that you may not know. I have some output and input figures with respect to the gas in the green system and I am wondering if you would be able to validate those or shall we have to go to the gentlemen, I think Mr. Barnett,

A. He verified it.

Q. Would he have to——

A. Yes, sir.

Q. You wouldn't be in a position to verify them, would you?

A. No, sir. I did not look at the figures.

Q. I think he did and I will call him instead of you.

Mr. Carter: That is all I have of Mr. Nelson.

Mr. Gooch: Your Honor, I have a couple of quick questions.

Direct Examination

By Mr. Gooch:

Q. Mr. Nelson, again you were interrogated about the United exhibit #14, which is the filing that United made in connection with the Commission order #431. If it is not clear, let's make it clear. Has the Federal Power Commission allowed you to put that tariff into effect?

A. It has not.

Q. Is it in effect right now?

A. No, it is not.

Q. Now, Mr. Nelson, you were asked about some discovery that a Mr. Miller did on behalf of Monsanto. Do you recall those questions?

A. Yes, sir.

Q. That was in connection with the curtailment case that was pending before the Federal Power Commission, is that correct?

A. Yes, sir.

Q. And wasn't United induced to cooperate with Mr. Miller so that Monsanto could make a full discovery so that all material facts could be brought out before the Federal Power Commission?

A. Yes, sir.

Q. Now, you were also asked some questions about increases in delivery, I am not quite sure I followed it, increases in delivery to certain customers after May 1968, were you not?

A. Yes, sir.

Q. Were those increases in delivery certificated by the Federal Power Commission?

A. Yes, sir, they were.

Q. And you were asked a series of questions about being —about charging higher rates and I don't pretend that I follow the questions but let me ask you this. Are your rates, as to resale and transportation customers, regulated by the Federal Power Commission?

A. Yes, sir.

Q. Now, Mr. Nelson, do you think the Federal Power Commission can permit you to discriminate against various classes of customers?

A. No, sir, I don't.

Q. Now, you were asked some questions about some gas going into the green system from Louisiana. Most of our questions have, for some reason, been centering around that area, so let me broaden my question. Do you have producer contracts certificated by the Federal Power Commission in other areas of Louisiana other than the New Orleans division?

A. Yes, sir.

Q. And those sales, even though they are located in the state of Louisiana, are certificated from inter-state com-

merce by the Federal Power Commission, aren't they?

A. Yes, sir.

Q. Now, Mr. Nelson, I have a question that I am sorry to ask in this form so let me ask it this way. You have testified about how you observed the restrictions in the contracts on those producers whose gas goes directly into the green system, haven't you?

A. Yes, sir.

Q. Have you been put on notice that the staff of the Federal Power Commission were concerned that those sales are jurisdictional sales?

A. I have heard that, yes, sir. I heard the statement made.

Q. That issue then, will come before the Federal Power Commission to determine whether or not those sales to the green facilities, the sales too are jurisdictional?

A. Yes, sir.

MR. GOOCH: I believe that is all I have.

MR. CARTER: I believe I do have one more question, as a result of that little intermission.

RE-CROSS EXAMINATION

BY MR. CARTER:

Q. Mr. Nelson, at page 12, I think it is but I can't be sure, of the proceeding before the FPC, Mr. Cassin your Vice-President and General Counsel, said in a colloquy with the presiding examiner and the presiding examiner said, following the preceding case, "Non-jurisdictional by the Federal Power Commission", and Mr. Cassin said "Yes, and would come under the jurisdiction of the Louisiana Public Service Commission by virtue of which it meant the rates would have been lowered to these Citygate customers because the Louisiana Public Service Commission is a little more rigorous, considerably more rigorous in its regulatory attitude than the Federal Power Commission". Are you familiar with that statement by Mr. Cassin?

A. Yes, just what you read there.

Q. You haven't heard of it before but you do agree with Mr. Cassin's statement, do you not?

A. Well, I don't think you could say that. We don't know what the Louisiana Public Service Commission would do.

Q. Well, you remember the Florida Parishes case, don't you?

A. Yes, sir.

Q. Let me show you footnote #9 of the Federal Power Commission's decision in that case and I point out to you, at the bottom of that, page #565 of the FPC decision. Would you read that to yourself?

A. All right, sir.

Q. In that case, it is pretty clear that the end result of your being under the jurisdiction of the Federal Power Commission, rather than the Louisiana Power Commission was to bring about a nine cent per Mef increase in your gas.

A. At the time of that decision, yes, sir.

Q. That was about 1965 or 1966, I believe Mr. Cassin said earlier?

A. I don't know when it was.

MR. CARTER: I believe that is all.

MR. BELVIN: We have no questions.

THE COURT: You are excused, sir. Thank you very much. May I ask you, Mr. Carter, how many more witnesses do you have?

MR. CARTER: I am going to have to—I will have a few short questions for Mr. Belvin and an even shorter set for Mr. Barnett. Mr. Barnett will be pretty totally related to those figures that I just mentioned.

THE COURT: All right, sir.

MR. CARTER: I think we are getting along fairly well, Your Honor.

THE COURT: Well, let's proceed then.

MR. CARTER: All right, let's do Mr. Belvin then. Mr. Belvin, would you come forward?

MARTIN THOMAS BELVIN, JR.

called as an adverse witness by Louisiana Power and Light company and having been first duly sworn, testified as follows:

CROSS EXAMINATION

BY MR. CARTER:

Q. Give your full name and address, please, sir.

A. My name is Martin Thomas Belvin, Jr. I reside at 2041 Holly Oak Street, Shreveport, Louisiana.

Q. How long have you been with United Gas Pipeline Company, Mr. Belvin?

A. Twenty-three years.

Q. And did you go with that company right after you got out of school?

A. Yes, I went with United in 1948.

Q. And I believe you told us the other day that you went to Texas A&M?

A. Yes, sir.

Q. And you got a degree in engineering?

A. Bachelor of Science and Civil Engineering.

Q. And your job with United Gas is just what, right now?

A. At the present time, Executive Assistant.

Q. And you are an assistant to whom?

A. To the Senior Vice-President of Operations and Engineering.

Q. And he is who?

A. Mr. C. W. Hollingshaud.

Q. All right, and I believe the company has what they call a supply and demand committee?

A. Yes, sir.

Q. And you are on that committee?

A. Yes, sir, I am a member of that committee.

Q. And that committee is wrestling with the problem of trying to do just what its name is, get enough of supply to meet the demands, is that right?

A. Sir, we are attempting to fill out two storage fields at this time. That is our prime operation and function, sir.

Q. All right. Mr. Belvin, there has been a map already introduced into evidence that we talked about with you the other day, so this will have some continuity. I am showing you what is now Commission exhibit #1, which I identify to you as LP&L—Belvin #1. Do you recall that map?

A. Yes, sir.

Q. And is it correct that this map, this large map that I have in front of you, which has been identified as LP&L—Belvin #2, is an identical map with the LP&L—Belvin #1 with respect to the New Orleans division.

A. Yes, the best I can tell, it is a blow-up of the New Orleans division, yes, sir.

Q. So that the green lines on LP&L—Belvin #2 would be the same as the green lines on Commission exhibit #1?

A. Yes, sir.

Q. Now the green line, Mr. Belvin, constitutes the system that I believe you have referred to in your testimony before the FPC as the intra-state system and if you need to re-

fresh yourself, I refer you to pages 2008, particularly 2018.

A. Yes, sir, I did use that term but like I told you the other day, there was an explanation at some other page, I don't remember where I said, in using that contradiction, that was the system that kept the gas within the state of Louisiana.

Q. Yes, sir, in fact, that is my next question. You stated, in your testimony, that the green system was, and I am quoting now, "capable of keeping the gas wholly within the state of Louisiana", isn't that correct?

A. Yes, sir, that is correct.

Q. Now, I think it has already been somewhat established, but just so the record will be clear as to your testimony, is the pressure in the black system higher than that in the green system?

A. Yes, sir. It is normally higher.

Q. And do you have valves and regulators to keep the gas in the black system from flowing into the green system?

A. From flowing into the green system?

Q. From flowing into the green system.

A. No, sir, we have valves and regulators and we do have two regulators that do let the gas flow into the green system from the black system.

Q. Well, maybe I should ask my question a little differently and you will understand it better. Let me ask you, if it isn't correct, that you have valves and regulators which separate the two systems or keep them separate unless you turn a valve that would let the gas from the black system into the green system?

A. Mr. Carter, that is true as far as the valves, the regulators are set automatically and they do what they are instructed to do by our pre-setting on them, sir.

Q. Right. And even there you—United is able to control the flow of gas so that the gas from the black system can be kept out of the green system or vice-versa. You can, by doing a setting, make gas go from the black system into the green system, isn't that right?

A. Yes, sir, that's right.

Q. And do you have meters that count and record all of the gas that goes into the green system?

A. At certain locations, there are meters Mr. Carter. At other locations, there are not meters.

Q. Well, what I am getting at, is that, you can account

for and you know exactly how much gas goes into the green system, do you not?

A. Normally, yes, sir.

Q. And the way you make a count of those—something like gas, is to meter it, isn't it?

A. Yes, sir.

Q. And so the way you keep the count is you pass the gas through a meter?

A. Yes, sir, that is right.

Q. And all I am asking you, is, don't you meter all of your gas that flows into the green system?

A. Mr. Carter, I said normally we do, but there are connections between the systems where there are no meters and the gas will not be measured when it goes from one system to the other.

Q. Just what do you mean by "not being measured"—by gas not being measured as it goes into the other system.

A. I didn't say other system, I said from the black system to the green system.

Q. Yes, well, where do you have a place where there is no measurement of the gas?

A. Sir, I didn't—I said there are points that are connected that do not have measurements, sir. I didn't say we are doing it.

Q. All right.

A. There are points we discussed the other day——

Q. All right, that is all I wanted to know. Now, Mr. Belvin this has been partially covered and so the record will be plain about it, is there any gas that goes into the green system that is produced in any state other than Louisiana?

A. Mr. Carter, I do not know whether I am qualified to answer that because I do not know—the way I understand it——

Q. Well, let me ask you this then.

A. The Timbalier Bay gas, sir, is located off-shore. It is in what I understand is a disputed area and I do not know whether it is in the state of Louisiana or whether it is outside, sir.

Q. Well, Mr. Belvin, who would be able to answer that?

A. Sir, I think that is before the Court right now, the way I understand it, sir.

Q. Who from United, could answer my last question, as to whether there is any gas that goes into the green

system that is produced in any state other than Louisiana?

A. Well, sir, other than that one exception, I guess I can answer that. There is none other than that one area, sir, that I know of.

Q. When you say that one area——

A. I am talking about the Timbalier Bay off-shore area, sir.

Q. Is there any gas in the green system, Mr. Belvin, sold outside of Louisiana?

A. No, sir.

Q. And I think it is plain, from the map, just so the record will reflect it as well, is there any part of the green system that is located outside of Louisiana?

A. No, sir.

MR. CARTER: Your Honor, I want to offer LP&L—Belvin #2.

THE COURT: In the absence of any objection, it is accepted.

Thereupon the exhibit marked LP&L—Belvin #2 was received into evidence and filed with the clerk of court.

MR. CARTER: Those are all of the questions I have of Mr. Belvin.

THE COURT: Are there any further questions of this witness?

MR. GOOCH: If the Court please, could Mr. McHenry ask these questions?

THE COURT: Yes, sir.

MR. MCHENRY: Mr. Court Reporter, my name is George W. McHenry. At this time, Your Honor, we would like to introduce the original of the deposition taken of Mr. Belvin a few days ago. Do you have the original of that deposition——

MR. BARBER: May it please the Court, Mr. Belvin has the original. He has made his corrections, a typed list of them, which needs only his signature. It has been prepared and if he can make that affidavit in front of your clerk and sign it, the deposition will be ready to file. Would you resume the stand, Mr. Belvin and take that with you. If the Court please, we had an agreement with Mr. Carter, due to the shortness of time, that we would follow this procedure in making the original available and we just

hadn't gotten around to getting this done.

THE COURT: All right, sir.

DIRECT EXAMINATION

BY MR. BARBER:

Q. Mr. Belvin, would you please look at the last page of a seven page list of changes, consisting of six pages of changes and an affidavit and read to yourself, not out loud, the affidavit, please?

A. Yes, sir, I have read it.

Q. Are you M.T. Belvin, Jr.?

A. Yes, sir.

Q. Would you sign this in front of this clerk, the last page of the original of your deposition?

(Thereupon the witness complied.)

BY MR. BARBER:

Q. Are you the same M. T. Belvin, Jr. whose signature appears at the end of the original of that deposition and at the end of this list of changes?

A. Yes, sir.

Q. Do the foregoing six pages of changes constitute your corrections to the transcription of that deposition?

A. Yes, sir.

Q. That has heretofore been typed and presented to you?

A. Yes, sir.

MR. BARBER: I will ask the clerk to notarize the original of that, Your Honor.

THE WITNESS: Well, there is one thing, the number two in here is not the one I was looking at when I—that is the number two over there.

MR. BARBER: Yes, sir. Mr. Carter, may it be agreed and stipulated that you have substituted into the original record, in this case the deposition exhibit that is marked Belvin #2 and that a copy has been enclosed in the envelope of the exhibits.

MR. CARTER: Mr. Barber, I don't know what has been done to the deposition, but I have put the large map that LP&L—Belvin #2, into evidence.

MR. BARBER: The one that was marked at the deposition?

MR. CARTER: That's right.

THE WITNESS: We agreed to talk about a green line and all the lines are blue on that map there.

DIRECT EXAMINATION

BY MR. MCHENRY:

Q. Mr. Belvin, I show you a map of part of the United Gas Pipeline System, which has been denominated herein as FPC exhibit #1 and has been referred to by Mr. Carter as LP&L—Belvin #1.

A. Mr. McHenry, this map is the complete United system, sir.

Q. All right. Will you please clarify for me what the green system depicts and the black system and the orange dots labeled A to X. I think that is four questions for clarification.

A. Well, sir, the black system on this map is the certificated system—that has been certificated with the FPC. The green system is the system in the New Orleans division—that we are requesting certification under the FPC docket #71-89 and this system serves in the Lafayette district, sir.

Q. What do the orange point, labeled A through X, depict?

A. Well, sir, those are inner-connections between the two systems where the gas can go either to the inter or intra system, sir. Excuse me, sir, from the certificated to the system where we are asking for certification.

Q. Does the application and =CP 71-89, the Florida Parishes case, reflect that United means for the green system to be inter, that is non-certificated?

A. Mr. McHenry, since we have—United Gas Pipeline Company has asked for certification, sir, I believe we do, sir.

Mr. Carter: We object to this constantly leading the witness, Your Honor.

By Mr. McHenry:

Q. Mr. Belvin, I refer you to exhibit =18 of the FPC, which contains certified copies of the producer's certificates and the application of those certificates in FPC docket #CI 67-98, CI 68-813, CI 68-1146, and CI 70-529, I would refer you to an application filed on July 26, 1966 and CI 67-98 and CI 62-98, by Pan American Petroleum Corporation for a certificate of public means and necessity, authorizing them to sell to United Gas Pipeline Company. I also refer you to this temporary certificate issued by the Federal Power Commission on September 2, 1966 and CI 67-98, authorizing sales by Pan American Petroleum Corporation from the Bastian Bay field. Can you tell me, Mr. Belvin,

whether or not this is certificated, authorizing them to sell from the Bastian Bay field, that is located above "I" on the exhibit above you—before you?

A. Is that the Bastian Bay you were referring to?

Q. Yes.

A. Yes, that is the Bastian Bay field.

Q. All right, having purchased the certificated gas from American Petroleum Corporation—excuse me, that is Pan American Corporation—can you describe the flow of that gas, please, for me?

A. Well, sir, the gas from the Pan American Petroleum Corporation flows—is processed in the Getty Plant. The gas is delivered from the Getty plant to us to a dual twelve inch meter station and it is measured through the dual twelve inch meter station. It goes into a twenty inch line that is connected around a pig trap which is on the thirty-six inch and goes into a thirty-six inch line, sir, over to Lirette or Terrebonne Junction where it is then delivered into the thirty inch line going to Mobile.

Q. All right, part of the gas that comes from the Bastian Bay production facility is diverted into the green system in the Lirette area?

A. No, sir, the gas from the Bastian Bay field is diverted into the green system at Bastian Bay, sir, after it is measured through the dual twelve inch meter station after it enters the twenty inch line. There is a tap on that twenty inch line where the gas is then diverted up to the green system.

Q. All right, sir. I will refer you to the Bay Marshand area and ask you if United purchases gas from certificated —under producer's certificates from that field?

A. Yes, sir.

Q. Will you describe the flow of the gas in the black system after it is purchased from the Bay Marshand area?

A. Mr. McHenry, the gas that is purchased from Bay Marshand, it is also in the same line. They pick up gas from Timbalier Bay and additional gas from Caillou Island. The line then runs in a generally north, northwestern direction to a point on shore in Louisiana which we refer to as Lirette. And Lirette, sir, is connected into several lines. One of the lines being a sixteen inch line from Lirette to Mobile, it is also interconnected with other lines and the gas has, at times, been taken from this black line through a

regulator and put into the green line, which we refer to as the Lirette-Harvey line, sir.

Q. Do I understand you to say that the Lirette interconnection—that part of the gas, that uniform stream of gas is split and a portion of that gas goes into the producer's state and the remaining portion going on to the Mobile line?

A. Some of the gas goes into the green system and the other goes into the black system. The line going to the Mobile-Pensacola area, yes.

Q. All right, Mr. Belvin, referring you to the Shreveport division of Louisiana, could you tell me whether or not United purchases gas from any certificated producers in that area?

A. Sir, my knowledge, all of the producers in that area are certificated, sir.

Q. And does United have any resale customers in that area?

A. Yes, sir.

Q. Are those certificated producers in the Shreveport division and resale customers both within the state of Louisiana?

A. Did I understand you to say both of the producers?

Q. You just told me that United purchased from certificated producers in the Shreveport division.

A. Yes, sir.

Q. You also stated that in the Shreveport division, United had other resale customers.

A. Yes, sir.

Q. Are they all within the state of Louisiana?

A. Yes, sir.

Q. They are all subject to the Federal Power Commission?

A. Yes, sir.

MR. MCHENRY: That is all I have.

THE COURT: Are there any other questions for this witness?

MR. CARTER: Your Honor, we don't have any questions but we have a problem. These people have dumped on our desk about seven or eight minutes ago the list of changes here and I started going through them. There are six pages of changes in this deposition. I have been able to go through one page so far, by disregarding the witness and looking at the changes.

MR. MCHENRY: We will withdraw the deposition.

THE COURT: Withdraw the deposition? All right, sir. It will be withdrawn. What is the identification of that?

MR. MCHENRY: I believe it is FPC #22.

THE COURT: Number 22 is withdrawn, the Federal Power Commission exhibit #22. Is that all of this witness? You are excused, sir, thank you very much.

MR. CARTER: We call Mr. Barnett.

C. C. BARNETT

called as an adverse witness by Louisiana Power and Light Company, having been first duly sworn, testified as follows:

CROSS EXAMINATION

BY MR. CARTER:

Q. Would you give us your name and address, please, sir.

A. My name is C. C. Barnett and I reside in Shreveport, Louisiana.

Q. And you are with United Gas Pipeline Company?

A. United Gas Pipeline Company.

Q. And what is your job?

A. I am the Senior Vice-President in charge of gas management.

Q. All right. Did we ask you, earlier this afternoon, to go over your flow diagrams or any other statistics you had available to you and determine whether certain figures were accurate that were shown to you by Mr. Clann.

A. Yes, sir, I went over the figures.

Q. Do you know Mr. Clann?

A. Yes, sir.

Q. I believe you are old friends?

A. Old friends, yes, sir.

Q. I want to show you LP&L—Barnett exhibit #1 that consists of three pages and is entitled "United Gas Pipeline Company Sales EAX Transportation from New Orleans intra-state system, twelve months ended 12/31/70, adjusted, taken from flow diagrams filed in RP 71-41." Would you look at that document and tell us if you have been able to confirm that those——

A. If you will help me with it, show me a map of what you mean, the intra-state system to be sure I am on the green line and be sure we are talking about the same thing.

Q. Right, let's take Commission Exhibit #1, which is

also the same as LP&L—Belvin #1 and you will notice that it has green lines, purple lines, black lines——

A. Yes, sir.

Q. I am referring to the green system and I ask you if those figures relate——

A. That is why I asked you because the figures that we checked we came up to a point about twenty miles south of Baton Rouge and the line to Baton Rouge was part of the green line and I wanted to be sure we were talking about the same system.

Q. Mr. Clann tells me that these figures are excluding the Baton Rouge area. Is that correct?

A. They are excluding the Baton Rouge area but the Baton Rouge area is about twenty miles south of Baton Rouge and I want to be sure that we have the same specific point where you cut off, except to distinguish between the New Orleans area and the Baton Rouge area, but we consider them as one area.

Q. All right, what did you and Mr. Clann conclude or agree was the cut-off point?

A. Well, we concluded, these are his figures and he said that the cut-off point was at the point where the green line—where the green line crosses the middle thirty which is our thirty inch inter-state line going through Jackson, Mississippi. Now considering, at that point, anything north of that point on the green line is excluded, then the figures that you have given me, we have checked.

Q. Mr. Clann, by the way, advised you that those were not really his figures but were figures that were taken from your file, did he not?

A. Yes, sir. I understood that. What I was trying to make clear—definitions of line and I wanted to be sure that we were talking about the same line.

Q. And those figures on the LP&L—Barnett #1, then with that clarification, are correct?

A. Well, they appear correct in the time that we had to check them.

Q. All right, sir. Now, Mr. Barnett, I show you next an exhibit which I mark as LP&L—Barnett #2, a one page document entitled "Gas Field Input to United Gas Pipeline Company, Lines Supplying New Orleans Area, twelve months ended 7/31/70 adjusted, taken from flow diagram filed in RP 71-41," and I ask you if you and Mr. Clann went over those figures also and did you ascertain from your

own records, particularly your flow diagram, that those are correct figures?

A. If you consider the same point that we discussed on the Market Exhibit, which was a point where the green line on the map crosses our middle thirty inch line—I mean our east thirty inch line going to Jackson, Mississippi. To that point we have checked them and they appear to be all right.

Q. All right, sir, and these two asterisks that were placed along the side of these figures, one for Bastian Bay, opposite the figure one million, ninety-five thousand and the other being along side Bay Marshand, etc. The figure being two million, nine hundred twenty thousand, those asterisks are to indicate that the flow diagram shows that there may be some black gas, as I call it, flowing into the green system to the extent of those two amounts.

A. Yes, sir.

Q. What were those two figures, Mr. Barnett? Does not your flow diagram show that everything else is gas produced in Louisiana, flowing into the green system and being shipped and consumed in the green system?

A. In the green system south of the east thirty inch line, going to Jackson, Mississippi.

Q. Yes, sir, I forgot that but with that clarification, all of that gas, with the exception of those two asterisks, does fall within the question I just phrased?

A. Yes, sir.

Q. It is produced, shipped, delivered and consumed, all in Louisiana?

A. Yes, sir.

Q. Mr. Barnett, do you know how much Pennzoil Producing Company produces in the way of natural gas that is put into the Lirette line?

A. I do not have that figure, Mr. Carter. As previously mentioned Pennzoil Producing Company's gas in the Lirette field comes through a plant and from the tailgate of that plant, we have two separate systems, two separate meter stations, so it can be moved either to the green line or the black line, as the demand so indicates and our dispatcher so dispatches.

Q. As I understand it, Pennzoil Producing Company, first of all that is a wholly owned subsidiary of your parent, Pennzoil United, is it not?

A. Yes, sir.

Q. And Pennzoil Producing Company produces gas, in—what is it—the Bay Marshand or the Bastian Bay field?

A. No, sir, they produce gas in the Lirette field.

Q. In the Lirette field?

A. Yes, sir.

Q. All right, and as I understand it, from all of the other witnesses, the gas can be put directly into either the green line or the black line, depending which of the two regulator devices or metering devices are used?

A. That is right, yes, sir.

Q. And now I am wondering if you know how much gas—would you say—let's put it this way. Would you say that Pennzoil Producing Company produces as much as four million cubic feet of gas annually that goes into the inter-state line, the black line, that is four million MCF?

A. That is four billion——

Q. Four billion MCF.

A. Well, I don't know how we have operated, we operated as we needed it and I don't know what the break is between the inter and the intra purchases from the Pennboil Producing Company in the Lirette—roughly I would say we should have taken, probably about twelve or fifteen billion from it during the year but I do not have the disposition here with me of that gas between those two meter stations.

Q. Would you agree that it is more gas than this gas shown here by the asterisk, the two million, nine hundred twenty thousand, MCF and the one million, ninety-five thousand MCF?

A. I am not sure, I don't have the figures of that.

Q. Do you have the figures here with you?

A. No, sir, I do not have the figures.

Q. Mr. Barnett, these are your figures that I am showing you. This is one of your exhibits in the proceeding up in Washington. You will notice that in the Lirette field, Pennzoil Producing Company is shown to produce seventeen million, nine hundred thirteen thousand, seven hundred and seventy MCF, is that correct?

A. Yes, sir.

Q. Into the interstate lines?

A. That is the adjusted figure.

Q. All right——

A. Just a minute, let me see what I am reading.

Q. All right. Why don't you look over that whole document there.

A. Now repeat your question.

Q. What I want to know is how much gas does Pennzoil Producing Company produce that United puts into the black line—interstate line?

A. According to this figure, which was the twelve months ending July 31, 1970, all of it went into the green line.

Q. I see.

A. If I am reading it right and I think I am.

Q. Is that the result of an adjustment that Pennzoil made?

A. Yes, sir, that was adjusted to forecast forward. To prepare these cases, we take the forecast forward.

Q. What was the actual flow into the interstate, or black line?

A. The actual flow into the black line was eight billion, two hundred seventy-two million and into the green line was six billion, five hundred ninety-three million.

Q. All right, now after consulting your records there, are you able to agree with me that Pennzoil produced more gas during the period covered by this exhibit into the interstate or black line than gas which had been shown here by the asterisks, the two million, nine twenty at Bay Marshand and the one million, ninety five at Bastian Bay?

A. According to the exhibit, we were just looking at, yes, sir.

Q. And that is United's exhibit?

A. Yes, but I don't quite have the period—I didn't identify the period for that actually—that is what was worrying me.

Q. Would you do that?

A. That was twelve months, ending July 30th, 1970.

Q. That is the same thing as this except it shows thirty one days in July, which is correct I believe.

A. Yes, sir.

Q. So it is the same period of time as shown by LP&L—Barnett #2?

A. Yes, sir.

Q. So, Mr. Barnett, to summarize what we are getting at with the questions here, will you agree with me that by your own figures, if Pennzoil United and Pennzoil Producing and United Gas decided to not have any black gas at all go into the green system, that is a supply available, at least as of the last figures, July 31 of 1970, gas available by which Pennzoil, which is wholly controlled by your parent, could see to it that enough gas was put into the intrastate or

green line so that no gas from Bastian Bay or Bay Marshand would have to be put in it?

A. I do not agree with you, no.

Q. You don't agree with me?

A. No, sir.

Q. Well, tell me why you don't agree with me.

A. Well, during the months of December, January, February and March, when it gets real cold in New Orleans, we have got to have some gas in there to keep the thing going. The figures that you are looking at and the figures on there are annual figures, the total figure, but from month to month, and period to period, we have got to keep enough gas available in New Orleans to supply the heating load and when we need gas in New Orleans to supply the heating load or any load, we have to—and we don't have it on the so-called green system—we have got to bring it from the so-called interstate system to supply the customers in New Orleans.

Q. Do you have any peak day figures that would prove that?

A. No, sir, I do not, with me.

MR. CARTER: That is all, Your Honor.

THE COURT: Any further questions of this witness?

MR. GOOCH: I have just a couple, if the Court please.

DIRECT EXAMINATION

BY MR. GOOCH:

Q. What is the name of your producing subsidiary?

A. Pennzoil Producing Company, it was formerly Union Producing Company.

Q. Does Pennzoil Producing Company have certificates granted by the Federal Power Commission?

A. Yes, sir. Pennzoil—we have contracts with Pennzoil Producing Company, just like we have with Texaco—Pennzoil Producing Company files those contracts and gets certificates with them from the FPC just like any other producer.

Q. Does it therefore become jurisdictional?

A. Yes, sir.

MR. GOOCH: I have no more questions, thank you sir.

DIRECT EXAMINATION

BY MR. HARVIN:

Q. Mr. Barnett, those figures that were in this thick volume of material over here that MR. Carter asked you about, was that a part of the evidence that you presented to the Federal Power Commission?

A. I am sure they were. I don't recall the case he had but I am sure they were the figures.

Q. You testified for some length before the Federal Power Commission?

A. Yes, sir, I testified before them.

Q. And in which of these proceedings, curtailment or——

A. I testified before them in the curtailment proceeding and the rate case proceeding and certificate proceeding.

Q. How long did you testify at the curtailment proceeding?

A. I testified—are you talking about the cross examination?

Q. Yes, sir.

A. I testified on cross about three and a half days.

Q. Being questioned by all of these intervenors?

A. They took turns at me, yes, sir.

Q. With respect to this gas that you have been questioned about, that is produced by Pennzoil Producing Company, in what general area is that located?

A. Pennzoil—we were talking about the Lirette field, which is southeast of New Orleans. I would say it is on the map but it is southeast of New Orleans and also in that field we have a focal point of other pipelines coming in, so not only do we have a field there, we have a focal point, so people speak of the Lirette point as our kind of a gathering—centralized point and we speak of Lirette as a particular field.

Q. From the point of the Pennzoil Producing Well, is there any common point where that gas is co-mingled before it is split off into the black line and into the green line?

A. Well, the producer, of course—well the producer has a line to the gasoline plant which is a common line and then it is processed at the gasoline plant and at the tailgate it is split off. It comes out into a header, which is the producers property and which is the plant's property and we connect to that header through two meter stations and

our property and our purchase and our payments begin at that point.

Q. All of that gas then, comes to a common header before it is split off into separate lines?

A. It is either—the header is either owned by the producer or by the gasoline plant. It is not owned by United Gas Pipeline Company.

Q. You were asked many questions about peak days and demands in the New Orleans area. Are you familiar with the information that was given in that regard in Mr. Echterhoff's prepared testimony?

A. Not fully, that is why I did not want to refer to it, because I wasn't fully familiar with it. I didn't want to be misquoted or misquote Mr. Echterhoff.

Q. But that testimony, you recall, does deal with that question.

A. Yes, sir.

Q. And you recall also that on peak days there, the estimate for 1971-72 winter forecasts a deficiency, does it not?

A. Yes, sir.

Q. And the same thing is true for 1972-73, there is a deficiency forecast as between the available supply and demand, is there not?

A. Yes, sir, I knew that. That is why I was trying to make the point, during those winter months we have just got to have some gas in there, period.

Q. Where it is stated here, these figures, you can see there will be a deficiency in the peak day supply for 1971-72 and 1972-73 of, what is this, five hundred eighty-nine million cubic feet per day and six hundred eighty-four million cubic feet per day respectively?

A. Yes, sir.

Q. That is if you rely on nothing but the non-certificated gas?

A. That is correct, yes, sir.

MR. HARVIN: That is all we have of this witness, Your Honor.

THE COURT: Any further questions of this witness?

MR. CARTER: I am going to, as a result of that last series of questions, I am going to have to ask Mr. Barnett to do a little drawing.

RE-CROSS EXAMINATION

BY MR. CARTER:

Q. Mr. Barnett, let's get it straight about that business of Pennzoil, the way the lines go. I am handing you a piece of yellow paper, do you have a pen with you?

A. No, sir.

Q. I am getting you a black felt-pointed pen and what I am going to do is ask you, piece by piece and step by step, to draw just a rough sketch here, the way the gas flows from the producer through the plant, from the plant through the line, where United Gas picks it up and it is separated and so forth.

A. If I can talk from a layman's standpoint and not all of the valves and all of the intermediate connections and separators and what not, I think I can.

Q. Why don't you try to do that, please, sir.

A. Now repeat what you want?

Q. On this blank piece of paper, I would like, first, for you to put down where the wells are, just put something to designate the wells. All right, that is a circle with an asterisk through it, is it not?

A. Yes, sir.

Q. All right, from the wells, where does the gas go?

A. It goes through a series of separators that are owned by the producer and it goes through a gasoline plant.

Q. All right, would you make a mark—you have got a triangle with a G in it and that is the gasoline plant and at that point—first of all, who owns that gasoline plant?

A. The gasoline plant is owned by our producer.

Q. Pennzoil Producing?

A. No, sir. Pennzoil does not own the plant. The plant is owned by—I believe that plant is owned by Humble and they in turn have some arrangement to process Pennzoil's gas.

Q. All right, at that point, then Pennzoil Producing Company's gas has come out of the ground, through some separators and into the gasoline plant owned by Humble, is that correct?

A. Right.

Q. All right, now after Humble has taken out whatever hydrocarbon or whatever you all take out of it, then what do you do—where does it go then?

A. Well, as part of the facilities in the gasoline plant,

they come out through a series of separators and they come out into a header which is in the plant yard, next to the gasoline plant.

Q. Well, what is a header?

A. That is a short connection that comes out to kind of bring it into the line, you come out with your main line and it is kind of a "T", it is a short "T" is really what it is.

Q. Just like you have got it drawn there, just a short "T". All right, and then what happens when it goes——

A. And that is the producer and we make a contract with the producer to buy the gas at that point, right there, and we put in a gas purchase meter station.

Q. All right, and you are making that a little box sitting on a pedestal there.

A. No, I am making it like a little box with a little line to it.

Q. All right.

A. Then that is our property, that is United Gas Pipeline's property, beginning right there.

Q. All right, where you put that arrow.

A. And then that gas is brought, and that is where we pay for it, and then the gas moves right on into New Orleans.

Q. All right, now suppose though, that you wanted to move in the black, or interstate line.

A. Well, then we would have a purchase point at this point right here which is on the—we would have another meter right here and that is the meter station where we account for the gas. We make our reports and we account for that on the FPC rate schedule.

Q. Yes, sir.

A. And we buy the gas at that point——

Q. Let's call it interstate.

A. Well, let's call it Mobile.

Q. Mobile, all right, and that is out of this meter——

A. That is out of this meter and United Gas Pipeline Company's point of ownership begins at that point right there.

Q. Right where that arrow shows?

A. In other words, our point of ownership is on the inlet side of the gas purchase meter station.

MR. CARTER: Your Honor, I want to identify that drawing as LP&L-Barnett #3. That is all of the questions that I have.

MR. GOOCH: We have no questions, Your Honor.

THE COURT: You are excused, Mr. Barnett.

MR. CARTER: I would like to offer LP&L-Barnett #1, 2, and 3, Your Honor.

THE COURT: Any objections? Admitted.

Thereupon the exhibits marked LP&L-Barnett #1, 2, and 3 were received into evidence and filed with the clerk of court.

MR. CARTER: Your Honor, I believe that is all we wish to present on the jurisdiction. Of course, we have written no memorandum of brief in this matter, with respect to a number of the things that have been brought up today and we, of course, will want to do that at some time here.

THE COURT: Could I have other counsel give voice to what they would like to do as far as giving memorandums, there has been a good bit of testimony taken.

MR. HARVIN: Your Honor, because of the fact that we are under a restraint, we took pains to be sure to submit a brief today and we would be most appreciative of the Court for taking this matter on in a hurry as you did, and we ask only, if time is going to be given for any further briefs from the parties, the matter has been pretty well briefed by the presentation earlier, before Judge Dawkins, as well as the Court of Appeals, that it be done again and accelerated in view of the Court of Appeals instructions that this matter be expedited. If we are going to get anything more in, we will get it in right away, but I think we are standing on our briefs that have been submitted today.

THE COURT: I think that the Court will do this since the causal situation is not going to make it any longer, that the Court will allow all parties until Monday, the 14th to file any briefs.

MR. CARTER: Your Honor, when you say, have your briefs in, you are referring to having it in the mail or being delivered to the Court?

THE COURT: I would like to have it delivered by that time.

MR. CARTER: All right, fine.

THE COURT: In other words, that is a Monday so you will have to put it in the mail either Friday or Saturday.

MR. CARTER: We will have anything delivered by Monday——

THE COURT: And if you would, in this particular instance, I don't usually accept filings here but in this particular instance, you can file it to me direct. It would be Post Office Box 990 in Alexandria. This and any further communications regarding this matter.

MR. CARTER: Your Honor, just one last piece of unfinished business and that is on the extracts of the Texaco contracts. May I suggest that we just file them LP&L-Texaco #1 and LP&L-Texaco #2?

THE COURT: That will be acceptable.

MR. CARTER: And we will supply the opponents at the same time we do the Court.

THE COURT: Right, sir.

MR. GOOCH: I have two points, I just want to make it certain that I have made a formal offer of every exhibit, offered and marked by the Federal Power Commission with the exception of the Belvin deposition, we offer all of them into evidence.

THE COURT: I believe that would be exhibits #1 through 21.

MR. GOOCH: I believe that is right.

THE COURT: Accepted.

MR. GOOCH: When I was marking the exhibits, I neglected to mark one and it really doesn't have to be an exhibit, but I would like to mark it—the Monsanto company also is appealing the action of the Federal Power Commission in connection with the curtailment case and I felt obliged to call that fact to the attention of the Court and I have a certification from the Secretary pointing out that an aspect of the curtailment case that has been taken to the United States Court of Appeals for the District of Columbia circuit and I have a Power Commission brief that will be filed and if I may I would like to mark that as an exhibit and include it in the record of the case.

MR. CARTER: Your Honor, I think for the same limited purpose that Mr. Gooch stated, when he made his original offer of these other documents, then we have no objection.

MR. GOOCH: Well, that is exactly right. The only thing, the brief is a brief on the law and it is no different than what we have filed or will file in this case.

THE COURT: Accepted with the limitation cited by Mr. Carter. Is there anything further?

Thereupon the exhibits marked Commission #1 through #21 and the brief were received into evidence and filed with the clerk of court.

THE COURT: Court is adjourned.

Certificate

I, Jackie D. Weaver, United States Court Reporter, United States District Court, Western District of Louisiana, do hereby certify that the above and foregoing 181 pages of typewritten matter constitute a true and correct copy of proceedings had at the time and place as hereinbefore set forth on page 1 hereof.

In Witness Whereof, I have hereunto affixed my signature at Alexandria, Louisiana, this 5th day of June, A.D., 1971.

Jackie D. Weaver
/s/ Jackie D. Weaver

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matter of
UNITED GAS PIPE LINE COMPANY } Docket No. RP 71-29

STATEMENT OF POSITION ON BEHALF OF
LOUISIANA POWER & LIGHT COMPANY

Pursuant to the order of the Commission issued December 10, 1970, Louisiana Power & Light Company (LP&L) files this statement of position on the record of this proceeding supplementing and augmenting its statement of position filed heretofore with the Commission.

Louisiana Power & Light Company asserts as a peremptory matter that the Federal Power Commission is without authority or jurisdiction under the provisions of the Natural Gas Act (and particularly Section 1(b) thereof) to interpret, regulate, apply or otherwise administer the provisions of the contracts for the sales of natural gas by United Gas Pipeline Company (United) to Louisiana Power & Light Company for use in the generation of electricity at the Sterlington and Nine Mile Point generating stations of LP&L and in particular, the Commission is without authority to implement any alleged "curtailment program" by United in this proceeding with regard to such non-jurisdictional direct sales to Louisiana Power & Light Company for industrial consumption. The Commission is similarly without authority or jurisdiction to in any way regulate or apply any such "curtailment program" with regard to the sales by United to the Nine Mile Point generating station of Louisiana Power & Light Company at Westwego, Louisiana, to the extent that such sales are sales of gas not in interstate commerce within the meaning of the Natural Gas Act.

This Statement of Position is filed without waiving or otherwise affecting the position of Louisiana Power & Light Company that United Gas Pipe Line Company has not had the contractual right in the past, and does not have the contractual right to continue to reduce deliveries of gas under the so-called "Impairment of Deliveries" clauses of its contracts with LP&L, dated February 20, 1956, as amended,

and May 6, 1968, and that the Federal Power Commission is without jurisdiction or authority over the application of such contractual provisions. Louisiana Power & Light Company further states that any curtailments by United have constituted and will continue to constitute breaches of United's contractual obligations to LP&L under said contracts, and LP&L specifically reserves all of its contractual rights and remedies, including the right to seek injunctive relief in any Court, with respect to any failure on United's part to deliver contract quantities of gas subject only to the limited and qualified stipulation covering the period from November 1, 1970 through March 31, 1971.

Louisiana Power & Light Company states that grave problems with respect to the reliability of electric power and service in the South Central area of this country and, in fact, throughout the whole eastern half of the country, will exist if the programs proposed by United are allowed by this Commission or the courts to be implemented. Reference is made to the letters to the Commission of J. Robert Welsh, Chairman of the Southwest Power Pool, dated April 22 and May 21, 1971, and of William B. McGuire, Chairman, of the National Electric Reliability Counsel, dated May 5, 1971, in this connection.

As indicated by the attachment "A" to this statement (Fuel Oil Alternate Fuel Burning Capability, dated May 20, 1970, in response to an inquiry by United in these proceedings) the use of fuel oil for the generation of electricity is strictly an emergency matter insofar as LP&L is concerned. LP&L estimates that at least five years would be required to convert its generating facilities to a point where they could be operated on a continuous basis with fuel oil, and that the cost of such conversion would range from $180,000,000 to convert for operation on 2% Sulphur No. 6 oil with sulphur removal equipment to $130,000,000 for operation on 1% Sulphur No. 6 oil with sulphur removal equipment; the cost would be approximately one-half of the above amounts without sulphur removal equipment; it is questionable as to whether applicable air quality standards would be met even with the unproven Sulphur removal equipment, and there is no question that the standards would not be met without such equipment. Such estimates do not include Sterlington Unites 3, 4, or 5 since conversion of them would require the installation of new boilers. The cost ranges from $30 to $50 per KW of generation.

Serious questions exist with regard to the availability of an appropriate grade of fuel oil for such conversion, and operation, and LP&L questions the practicability and advisability of any consideration of such an alleged "alternate" fuel in view of import problems, environmental problems and ultimate cost to the electric consumer.

With regard to the nature of the sales of electricity by LP&L to its customers, a monthly tabulation of sales for the years 1969 and 1970 is attached in thousands of kilowatt hours. Such tabulation is in response to the request of the Presiding Examiner herein of March 9, 1971. LP&L's "Commercial Sales" include sales to large apartment units for domestic users, and to other human need customers, such as schools, hospitals, office building and retail establishments. While LP&L has not been able to develop data on the ultimate use of the sales to governments and municipalities, such power is generally used for street lighting, sewage pumping, storm drainage, water plants, and other governmental services, as well as resale for domestic consumption. Similarly, it is understood that the sales for resale to rural electric cooperatives and other companies are principally used for non-industrial direct sales.

LOUISIANA POWER & LIGHT COMPANY
/s/ J. M. Wyatt
J. M. WYATT—*Senior Vice President*

Filed
June 14, 1971

—oOo—

(Title Omitted)

~~No.~~ 16,637

UNITED/PENNZOIL'S SUGGESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

As United Gas Pipe Line Company (United) and Pennzoil United, Inc. (Pennzoil) filed a brief when the case was pending before Judge Dawkins and an additional brief on May 27, 1971, they do not feel that it is necessary to file a third trial brief at this time. However, as the order of the United States Court of Appeals for the Fifth Circuit

FUEL OIL ALTERNATE FUEL BURNING CAPABILITY

May 20, 1971

Unit	Capability MW	Type of Oil	Storage Capacity Hrs. at Full Load	Mcf Equivalent Avg. Day	Mcf Equivalent Peak Day
Sterlington	333	None	None	—	—
Ninemile No. 1	74	No. 2	36	15,000	19,900
Ninemile No. 2	107	No. 2	36	21,000	28,000
Ninemile No. 3	135	No. 2	36	25,700	34,300
Ninemile No. 4	750	No. 2	36	126,000	168,000
Little Gypsy #1	244	No. 2	27	43,000	57,300
Little Gypsy #2	436	No. 2	27	75,700	101,000
Little Gypsy #3	549	No. 2	27	93,000	124,000
Buras No. 8	19	No. 2	65	4,200	5,600

Notes to Above:

As of this time none of our units are capable of operating continuously with an alternate fuel. Ninemile Point Units 1, 2, 3 and 4, Little Gypsy Units 1, 2 and 3, and Buras Unit 8 are all capable of operating on an emergency basis for periods of 27 to 65 hours at near full load with No. 2 fuel oil.

Sterlington Units 3, 4 and 5 (totalling 109 MW capacity) are not designed to be capable of conversion to fuel oil. Sterlington #6 (224 MW capacity) has no alternate fuel capacity at this time, however, construction for conversion to fuel oil as an alternate fuel is proceeding and completion is hoped for before the end of the summer of 1973. When those facilities are completed, Sterlington Unit #6 will be able to operate on No. 6 fuel containing less than 1% sulphur for not more than seven days at full load, at which time an outage will be necessary or other means used to reduce furnace deposits. Sterlington Unit #6 conversion to alternate fuel will cost 2 million dollars. An additional 8.7 million dollars will be required to convert to fuel oil containing a maximum of 1% sulphur and including sulphur removal equipment.

Conversion of all LP&L units capable of being converted to continual burning of oil containing 2% sulphur would cost at least 85 million dollars without sulphur removal equipment and an expenditure of at least 180 million

dollars would be required if sulphur removal equipment were installed.

LP&L—5/20/71

Attachment to letter of 5/20/71 to V. S. Brennan of United Gas Pipeline Company

LOUISIANA POWER & LIGHT COMPANY

Sales—1969 (MKWH)

	Direct				*Resale*			
1969	*Residential*	*Commercial*	*Industrial*	*Govt. & Municipal*	*Municipalities*	*Cooperatives*	*Other Companies*	*Total*
January	141,774	69,362	326,186	22,731	4,815	36,667	362,971	964,506
February	128,131	69,029	334,656	22,835	5,023	34,678	320,065	911,417
March	123,993	66,995	309,503	21,866	4,595	33,793	242,036	802,781
April	122,263	70,088	336,738	23,401	5,260	34,837	320,764	913,351
May	138,056	77,070	325,896	23,183	5,058	33,718	314,639	947,620
June	233,508	91,564	333,853	24,977	7,905	48,392	490,599	1,230,798
July	367,457	109,447	300,940	25,950	10,696	65,604	560,737	1,440,831
August	369,492	110,547	340,490	25,336	13,003	60,712	366,518	1,286,098
September	342,886	111,403	343,446	26,842	11,311	54,122	478,388	1,368,393
October	261,415	103,414	354,143	24,845	8,348	45,261	489,341	1,286,969
November	169,881	86,253	381,891	24,078	6,802	39,881	389,703	1,098,489
December	136,802	78,120	133,108	22,840	5,749	39,286	410,502	1,026,377
Total Sales	2,535,658	1,043,292	4,017,852	288,884	88,536	526,950	4,776,458	13,277,630

LOUISIANA POWER & LIGHT COMPANY

Sales—1970 (MKWH)

	Direct				*Resale*			
1970	*Residential*	*Commercial*	*Industrial*	*Govt. & Municipal*	*Municipalities*	*Cooperatives*	*Other Companies*	*Total*
January	159,995	80,242	368,893	22,928	5,857	42,400	265,634	1,045,949
February	147,717	77,907	338,647	23,378	5,984	42,704	404,700	1,041,037
March	132,147	75,175	339,226	21,886	5,359	36,373	408,194	1,018,360
April	133,332	77,099	371,519	22,957	6,056	38,632	194,626	844,221
May	200,391	94,038	364,851	24,045	7,546	43,726	193,379	928,176
June	255,843	103,557	362,887	25,238	9,975	52,529	227,819	1,037,848
July	366,558	119,094	358,510	26,915	11,913	66,217	383,643	1,332,850
August	379,103	119,386	380,759	27,491	13,145	67,817	372,019	1,359,720
September	396,757	123,610	368,363	27,894	12,304	67,397	451,526	1,447,561
October	319,473	117,042	337,780	23,920	8,822	48,908	370,554	1,226,449
November	171,268	93,276	360,135	23,169	6,269	41,683	258,309	954,301
December	151,397	87,793	340,080	21,242	6,282	42,775	190,592	839,161
Total Sales	2,813,981	1,168,218	4,291,609	290,975	93,712	591,161	3,811,186	13,066,833

entered May 14, 1971, directs this Court to make appropriate findings of fact and state its conclusions of law, (Order 5) United and Pennzoil feel that it is appropriate to suggest the following summary findings of fact and conclusions of law for the Court's consideration in connection with its preparation of either detailed findings of fact and conclusions of law or an opinion or memorandum of decision as contemplated by Rule 52 of the Federal Rules of Civil Procedure. The suggested findings and conclusions are:

Suggested Findings of Fact

1. Louisiana Power & Light Company (LPL) is an electric utility company which operates generation, transmission and distribution facilities, including the Sterlington generating station (near Monroe, Louisiana) and Nine Mile Point generating station (near Westwego, Louisiana.)

2. LPL, Arkansas Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service, Inc. constitute an interconnected electrical utility system known as the Middle South System. In addition, LPL is interconnected on an electric transmission grid known as "South Central Electric Companies" with eleven large electric utility companies in the south-central area of the United States.

3. United, a "natural gas company" as defined in § 1(b) of the Natural Gas Act (the Act), 15 U.S.C. § 717(b), is engaged in the transmission of natural gas through transmission lines located in the States of Louisiana, Texas, Mississippi and northward and eastward into the midwestern and eastern part of the United States.

4. United has entered into industrial sales contracts with LPL covering a portion of LPL's gas requirements at the Sterlington and Nine Mile Point stations.

5. United proposes to curtail deliveries of gas to its industrial customers, including LPL, and to all industrial customers on the systems of the pipelines who buy from United. United is now in fact curtailing all such industrial customers except LPL, and would be curtailing LPL were it not for the restraining order which has been in effect since May 1, 1971.

6. United's asserted justification for these curtailments is the shortage of natural gas caused in part by the increas-

ing demand for natural gas by consumers and declining rates of additions to natural gas reserves; these factors are matters of common knowledge which have been judicially noticed by the Fifth Circuit as recently as last year in the *Southern Louisiana Area Rate Cases. Austral Oil Co. v. Federal Power Com'n*, 428 F. 2d 407 (5th Cir.), *cert. denied*, 400 U.S. 950 (1970).

7. United has made application to the Federal Power Commission (Commission) for an order approving its curtailment program; administrative proceedings are currently pending before the Commission under FPC Docket No. RP71-29, FPC Docket No. R-418 and FPC Docket No. CP71-89 in which the Commission is currently considering United's proposed curtailment program either directly or indirectly.

8. FPC Docket No. RP71-29 was instituted on October 26, 1970 by United's filing of a proposed curtailment plan covering the winter heating season of 1970-71 (November 1, 1970 to March 31, 1971). On December 29, 1970 pursuant to the agreement of all but one or two of some fifty parties to that proceeding, the Commission approved United's winter curtailment program. LPL is a party to that proceeding and agreed to the order of December 29, 1971. On February 22, 1971, United filed a supplemental petition in FPC Docket No. RP71-29 in which it sought approval of a proposed curtailment during the summer of 1971 (April 1, 1971 to October 31, 1971). Since the filing of United's supplemental petition extensive evidence has been taken in this proceeding; the transcript now totals some 2,200 pages. Testimony from the intervenors and the Commission's Staff was filed on May 24, 1971. United's rebuttal testimony was due on June 11, 1971; the hearing is scheduled for June 27, 1971.

9. FPC Docket No. R-418 was initiated by the Commission's Order No. 431 on April 15, 1971. Order No. 431 directed interstate pipelines to take steps, including filling storage fields, in order to insure capacities to meet the heating season demands for the winter of 1971-72 (November 1, 1971 to March 31, 1972). The Order further directed the pipelines to file plans within thirty days indicating the way in which the pipelines proposed to meet the winter heating season demands. United filed its response on May 17, 1971; the Commission docketed the response under FPC No. RP71-129 and then on May 28, 1971 ordered

Docket No. RP71-120 consolidated for hearing and decision with Docket No. RP71-29. That order provided that persons who are parties to the proceeding in Docket No. RP71-29 will be deemed to be parties in the consolidation and need not file to intervene in Docket No. RP71-120. The order of May 8, 1971 also directed United to file evidence in support of its curtailment plan covering the winter season of 1971-72 by June 14, 1971. The remainder of the schedule was left to the presiding examiner.[1]

10. FPC Docket No. CP71-89 was instituted by United on October 1, 1970 in response to the Commission's letter of September 17, 1970, for the purpose of seeking certification of sales, facilities, and services in the New Orleans area including the sale by United to LPL at Nine Mile Point. Curtailment issues may be involved indirectly in this proceeding because of the requirement that the Commission consider the impact on existing certificated service in connection with its action on new certificate applications. United's direct testimony was filed on May 24, 1971. Testimony from the Commission staff and the intervenors was due on June 7, 1971. The hearing in this proceeding was scheduled to begin on that same day; presumably it did.

11. LPL is a party to the curtailment proceeding before the Commission and is urging in that proceeding that the Commission does not have jurisdiction to direct curtailment of deliveries under the industrial sale contracts with United at Sterlington and Nine Mile Point.

12. LPL is also a party to the certificate proceeding and is urging in that proceeding that the Commission does not have jurisdiction because, according to LPL, the system which serves the New Orleans area, including Nine Mile Point is an almost wholly intrastate system.

13. The deliveries at Sterlington are admittedly from interstate supplies, and the sale, service and facilities at Sterlington have been certificated by the Commission.

14. LPL urges before this Court the same reasons for lack of Commission jurisdiction over curtailment and certificate proceedings that it is urging before the Commission.

15. Despite LPL's contentions to the contrary, the cur-

[1] United, by letter dated June 11, 1971, copies of which were furnished to all parties, transmitted the Commission's order of May 28, 1971 to the Court because it supplements the schedule outlined to the Court at the hearing on May 27, 1971.

tailment proceedings and the certificate proceeding are not rate proceedings. Although the Commission is required by the existing authorities to consider price as one factor in the certificate case, this does not transform that proceeding into a rate proceeding. Likewise, although United has proposed that curtailments for the winter of 1971-72 be based in part on the price it receives for gas, this does not transform the curtailment proceeding into a rate proceeding.

16. The case is before the Court pursuant to the order of the Fifth Circuit entered on May 14, 1971 directing that a hearing be held on jurisdiction and on such other preliminary matters as might properly be considered. The parties brought no matters other than the jurisdictional question to the Court's attention; accordingly, the only issue before this Court is jurisdiction.

Conclusions of Law

1. The Commission should be allowed to make the initial determination respecting its jurisdiction if there is an arguable basis in fact or in law under which it may have jurisdiction. *Federal Power Com'n v. Arkansas Power & Light Co.*, 330 U.S. 802 (1947), rev'g. 156 F. 2d 821 (D.C. Cir. 1946); *Union Oil Co. of California v. Federal Power Com'n.*, 236 F.2d 816, 818, 819 (5th Cir. 1956), *cert. denied*, 352 U.S. 969 (1957); *Lone Star Cement Corp. v. FPC*, 339 F. 2d 505, 511 (9th Cir. 1964). This need for initial agency determination of its jurisdiction is particularly compelling when the jurisdictional issue brought before a Court is in the process of litigation at the agency. *Marine Engineers v. Interlake Co.*, 370 U.S. 173 (1962).

2. There is no dispute that Congress has given the Commission exclusive jurisdiction of the issues presented in United's certificate proceeding, FPC, Docket No. CP71-89.

3. Curtailment issues are also matters peculiarly within the province of the Federal Power Commission. *Panhandle Pipe Line Co. v. Com'n.*, 332 U.S. 507, 523 (1947); *Panhandle Eastern Pipe Line Co. v. FPC*, 232 F. 2d 467 (3rd Cir.), *cert. denied* 352 U.S. 891 (1956); *Panhandle Eastern Pipe Line Co. v. Michigan Consolidated Gas Co.*, 177 F. 2d 942 (6th Cir. 1949); *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (6th Cir. 1949); *Panhandle Eastern Pipe Line Co.*, 9 FPC 1330 (1950); *Panhandle Eastern Pipe Line Co.*, 8 FPC 1339

(1949); *Panhandle Eastern Pipe Line Co.*, 7 FPC 984 (1948); *City of Detroit v. Panhandle Eastern Pipe Line Co.*, 6 FPC 196 (1947).

4. No different result obtains because the exercise of curtailment jurisdiction may involve impairment of deliveries under industrial sale contracts. The Commission may allocate excess interruptible gas between industrial and resale customers, *Panhandle Eastern Pipe Line Co. v. Federal Power Com'n.*, 232 F. 2d 467 (3rd Cir.), *cert denied*, 352 U.S. 891 (1956), and may reallocate capacity from industrial customers to resale customers if the remaining service to the industrial customers meets the test of adequacy set out in § 7(a) of the Act, 15 U.S.C. #717f(a). *Granite City Steel v. Federal Power Com'n.*, 320 F. 2d 711 (D.C. Cir. 1963). Each of the Commission decisions cited in the preceding conclusion (United Sugg. Concl. No. 3) involved curtailment orders which allocated deliveries of gas among all of Panhandle Eastern's customers, both industrial and resale. Further, the Commission's decision in *South Georgia Natural Gas Co.*, 23 FPC 795, 797 (1960), alludes to the Commission's continuing jurisdiction to review any material change in certificated service.

5. The deliveries at Sterlington are undisputedly deliveries from an interstate gas supply which have been certificated by the Commission. There is evidence before this Court and the Commission that the system which serves the New Orleans area including Nine Mile Point is partly interstate and partly local in nature; the Commission is currently exploring its certificate jurisdiction at Nine Mile Point in FPC Docket No. CP71-89. Under *Florida Parishes, Louisiana Public Service Commission, v. Federal Power Com'n.*, 359 F. 2d 525 (5th Cir.), *cert. denied*, 385 U.S. 833 (1966), such deliveries from a commingled interstate and intrastate gas stream are subject to the Commission's jurisdiction. The amount of interstate gas reaching Nine Mile Point may vary from time to time but this Court has no warrant, on this record, for saying that the Commission cannot make a factual showing which would render the facilities jurisdictional or for concluding that such a jurisdictional conclusion by the Commission would be frivolous. *Lone Star Cement Corp. v. Federal Trade Commission*, 339 F. 2d 505, at 511 (9th Cir. 1964).

6. The contention by LPL that even when some interstate gas is mixed with local gas in the New Orleans area all the

gas is still produced and consumed wholly within the State of Louisiana is likewise unpersuasive. Similar arguments were made by pipelines which made sales for resale entirely within the boundaries of a single state, *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682 (1947), and by producers which made sales for resale entirely within one state. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954) (First Phillips). Both the pipeline sales and producer sales were arguably exempt under § 1(b) of the Act for this reason; in both cases the Supreme Court concluded that the Commission had jurisdiction.

7. Under *Transco, Federal Power Com'n v. Transcontinental Gas Pipeline Corp.*, 365 U.S. 1 (1961), the price factor must be considered by the Commission in connection with action on new certificate applications. This does not transform a certificate case into a rate case. *Panhandle Eastern Pipe Line Co. v. Federal Power Com'n.*, 232 F. 2d 467, 471 (3rd Cir.), cert. denied, 352 U.S. 891 (1956). The Commission may or may not be able to develop a factual and legal basis for consideration of price factors in curtailment contexts, but this Court should not deny the Commission an opportunity to develop such an argument. *Lone Star Cement Corp. v. F.T.C.*, 339 F. 2d 505, 511 (9th Cir. 1964).

8. Under *Lone Star Cement*, so far as the need for agency expertise is concerned, the key is that facts such as those involved in the questions of curtailment and certificate jurisdiction here, can only be elicited in an administrative proceeding. Some 2,200 pages of evidence have already been taken in the curtailment proceeding alone. Curtailment hearings are scheduled to begin again on June 27, 1971; the certificate proceeding hearings presumably began on June 7, 1971. It makes no sense to duplicate the Commission's hearings. Since the facts are being developed before the Commission it is only good sense that the Commission be the first to evaluate them. Exhaustion is particularly favored when the very question at issue is in the process of litigation before the agency. *Marine Engineers v. Interlake Co.*, 370 U.S. 173 (1962). The complexity of these issues also strongly supports initial Commission resolution. The existence and extent of the natural gas shortage about which so much has been written, the impact of year long curtailment on electrical reliability for which the Commis-

sion also has responsibility under the Federal Power Act, 16 U.S.C. § 791a., *et seq*, the formulation of a program to protect residential users of both gas and electricity, are all questions which require the Commission's expertise and which under the decisions, the Commission should decide initially. In the words of the Supreme Court in *Marine Engineers v. Interlake Co.*, 370 U.S. 173 (1962), the Commission's decision may not be the last word, but it must assuredly be the first.

9. All irreparable harm really means in the context of this case is whether there is an adequate remedy available by way of appeal to LPL if the Commission should decide that it has curtailment and certificate jurisdiction at both Sterlington and Nine Mile Point. *Lone Star Cement Corp. v. Federal Trade Commission*, 339 F. 2d 505, at 511 (9th Cir. 1964). However, even if this Court were required to consider factors such as those set out in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F. 2d 921, 925 (D.C. Cir. 1958) the Court is not persuaded that LPL has demonstrated irreparable harm. LPL has known since January 8, 1971 that curtailment might be required during the summer. It has known the details of the curtailment proposal for the summer since February 22, 1971. LPL did not file suit until March 31, 1971; even after that date it represented to the investing public in a registration statement filed with the Securities & Exchange Commission (Commission Ex. No. 21):

> "After June, 1971 the company expects to be able to offset any foreseeable gas curtailment by burning oil."

10. Despite the assertion of lack of Commission jurisdiction, LPL must exhaust its administrative remedies at the Commission before seeking judicial relief. It may not interfere with the Commission's proceedings now, but must wait, until there has been a proceeding before the Commission, a record adduced and an order issued. *Union Oil Co. of California v. Federal Power Comm.*, 236 F. 2d 816 (5th Cir. 1956), *cert. denied*, 352 U.S. 969 (1957).

11. Under these circumstances, this Court does not have jurisdiction of this case; it should be dismissed for lack of jurisdiction and the restraint previously imposed on United should end.

/s/ WILLIAM C. HARVIN
William C. Harvin
Wm. R. Choate
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Filed
June 15, 1971

(Title Omitted)

No. 16,637

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NAUMAN S. SCOTT, JUDGE:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an injunctive proceeding brought by Louisiana Power & Light Company (LPL) against defendants United Gas Pipe Line Company (United) and Pennzoil United, Inc. (Pennzoil) to restrain and enjoin the defendants from curtailing the supply of gas to plaintiff's Sterlington and Nine Mile Point generating stations in Louisiana and ordering defendants to deliver natural gas to plaintiff in accordance with the provisions of the current contracts between LPL and United.

LPL is a Florida corporation having its principal place of business in the State of Louisiana and is a "public utility" within the meaning of the Federal Power Act, 16 U.S.C. 791(a) *et seq.* and is the owner and operator of the Sterlington and Nine Mile Point electric generating plants previously mentioned.

Pennzoil and its wholly-owned subsidiary, United, are Delaware corporations having their principal place of business in the State of Texas. United is engaged in the transmission of natural gas through transmission lines located in states including Louisiana, Texas, and Mississippi and also delivers to interstate pipe line companies for resale. United has been furnishing natural gas to LPL at both the Nine Mile Point Station and the Sterlington Station under contract for many years.

JURISDICTION

LPL asserts that this Court has jurisdiction under 28 U.S.C. 1332 because this is a civil action in which the matter in controversy exceeds the sum or value of $10,000 and is between citizens of different states.

THE ISSUE

Pennzoil, United and the Intervenor, Federal Power Commission (FPC) dispute this Court's jurisdiction and have filed motions to dismiss on the contention that this matter involves a proceeding (curtailment of natural gas) which is presently before the FPC, that LPL is an active participant and a party to these proceedings before the Commission, and that the FPC has exclusive jurisdiction under Sections 4(b), 5(a), and 15 of the Natural Gas Act [15 U.S.C. 717(c), 717(d), and 717(o)].

FINDINGS OF FACT.

1. United has supplied gas to LPL's Sterlington Station under contracts which include a provision entitled "Impairment of Deliveries" as follows:

> "In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of

electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers."

2. United has supplied gas to LPL's Nine Mile Point Station under contracts containing provisions entitled "Impairment of Deliveries" as follows:

"Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers."

3. It is conceded that LPL is an industrial consumer and utilizes the gas delivered to it to generate the electric power at its Sterlington and Nine Mile Point Stations and not for the purpose of resale.

4. All gas delivered by United to the Sterlington and Nine Mile Point Stations is produced in Louisiana. All deliveries of gas to the Sterlington Station are interstate gas. Deliveries of gas to the Nine Mile Station are made through the "Green" pipe line which is located entirely within the State of Louisiana. The great bulk of the gas in the "Green" line is intrastate gas. However, some gas is dumped into the "Green" pipe line from the "Black" pipe line. This is interstate gas so there is a commingling of intrastate and interstate gas in the "Green" pipe line. An application is presently pending before the Federal Power Commission (RP 71-89) to certify the "Green" pipe line.

5. United filed with the FPC on October 26, 1970, a petition for a declaratory order to curtail gas deliveries during the winter months (November 1 to April 1) on a

ratable basis and in the following order: (1) gas used for industrial purposes, including gas used to generate electricity which in turn is applied to industrial uses, (2) gas used to generate electricity which is consumed by domestic customers, and (3) gas used by domestic consumers. United alleged that the curtailment was made necessary because the gas supply was insufficient to meet its contract requirements. Attached to the petition are exhibits including exhibits showing the United customers affected by the proposed curtailment, as follows:

Jackson Area

Industrials	6 customers
Power Plants	4 customers
Pipelines	2 customers
City Gates	1 customer

Mobile-Pensacola Area

Industrials	17 customers
Power Plants	2 customers
City Gates	3 customers

Shreveport Area

Industrials	5 customers
Power Plants	1 customer
Pipelines	6 customers
City Gates	2 customers

New Orleans Area

Industrials	4 customers
Power Plants	2 customers
City Gates	2 customers

Lafayette Area

Industrials	2 customers
Power Plants	1 customer

These are the parties (customers) affected by the FPC proceeding RP 71-29 who are not parties to this suit.

6. LPL filed its petition to intervene in RP 71-29 on

November 25, 1970 stating the "impairment of deliveries" articles of its contracts with United. It also stated its proposed curtailment violated these contracts; that the FPC did not have jurisdiction over United's sales to LPL because they constitute "direct sales" which are exempt under Section 1(b) of the Natural Gas Act and requests to participate in the hearing without waiving these objections. (FPC Exhibit 3, Item 5.)

7. The FPC approved United's curtailment program for the 1970-71 winter season by order in FPC Docket No. RP 71-29 dated December 29, 1970 (FPC Exhibit 3, Item 7.). This order was issued as a result of the settlement between the parties, including LPL.

8. United filed a supplemental petition in RP 71-29 on February 22, 1971 for the extension of its curtailment program from April 1, 1971 through October 31, 1971 (FPC Exhibit 3, Item 3.). The record does not disclose the number of (sic) identity of intervenors, including LPL, who intervened prior to November 25, 1970 in RP 71-29, however, an order was issued March 10, 1971, permitting the intervention of Aluminum Company of America, Boise Southern Company, Container Corporation of America, Marquette Cement Manufacturing Company, National Gypsum Company, New Jersey Natural Gas Company, Scott Paper Company, Transcontinental Gas Pipeline Corporation and United Gas, Inc., and on April 12, 1971 an order issued permitting the intervention of the City of Pensacola, Florida, et al., Clarke-Mobile Counties Gas District, General Services Administration, Northern Illinois Gas Company and Mississippi Public Service Commission (FPC Exhibit 3, Items 9 & 10.)

9. LPL has not denied United's assertion that its supply of gas is inadequate to meet its present and impending gas delivery commitments. It has, in fact, agreed to the curtailment approved in the order of December 29, referred to in Finding 7 above. The fact that the Natural Gas Transmission Industry has recently experienced a decline in the ratio of crude natural gas reserves to annual volume of consumption caused in part by the increasing demand for natural gas by customers and the declining rate of additions to the natural gas reserves has been judicially noticed by the Fifth Circuit. *Austral Oil Co. v. Federal Power Comm'n.*, 428 F. 2d 405 (5th Cir.) Cert. Denied, 400 U.S.C. 950 (1970) (Southern Louisiana Area Rate Cases.)

10. FPC Order No. 431 directed interstate pipe lines, including United, to take steps, including filling storage fields, in order to insure capacities to meet the heating season demands for the winter of 1971-72 (November 1, 1971 to March 31, 1972). The Order further directed the pipe lines to file plans within thirty days indicating the way in which the pipe lines proposed to meet the winter heating season demands. United filed its response on May 17, 1971; the Commission docketed the response under FPC Docket No. RP 71-120 and then on May 28, 1971 order Docket No. RP 71-120 consolidated for hearing and decision with Docket No. RP 71-29. That order provided that persons who are parties to the proceeding in Docket No. RP 71-29 will be deemed to be parties in the consolidation and need not file to intervene in Docket No. RP 71-120.

11. LPL has alleged (Complaint Paragraph 17) that the proposed curtailment by United could ultimately effect a "black-out" or "brown-out" which, under certain circumstances, could cover an area as large as the whole State of Louisiana, or, indeed, a several-state area such as occurred during the notorious "northeast black-out" in 1965. The record is bare of any evidence to support this allegations.[1] In fact, in a registration statement filed by LPL

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[1] Mr. J. M. Wyatt, Vice President of LPL, testified as follows when cross examined by Mr. Gooch, representing the FPC:

BY MR. GOOCH:

Q. All right, sir, now let's look under such things as litigation and regulations in the registration statement filed by the SEC. Mr. Carter has just said that they were not going to assume they would lose any suits. Would you show me anywhere in this registration statement filed in April, where Mr. Carter even disclosed to the public that there was a suit pending which could cause Louisiana Power and Light Company to suffer brown outs and black outs if this allegation were true?

A. If I understand your question, I don't see why it would be necessary to notify, because there was nothing involved here that would cause brown outs or black outs on this suit.

Q. Nothing involved in the suit?

A. In the suit that I am looking at here, if I understand your question.

Q. My question is—is the suit that we are here in Court for today, do you see that disclosed anywhere, to the public, that it is pending?

A. No, it is not in here.

Q. All right. Now, would you please look at the date of this certificate?

A. Yes.

Q. Will you tell the Court what this is?

A. May 19, 1971.

Q. Are you aware of the filing with the SEC that would either call to the attention the pendency of this suit to those who may be interested in pur-

with the Securities and Exchange Commission on February 19, 1971, the following statement was made:

> "FUEL SUPPLY. The Company's primary fuel is natural gas. Two of the Company's three major generating stations are outfitted to burn oil as a standby fuel, and the third station is presently being modified to allow the burning of oil as a standby fuel and this modification is scheduled for completion by June, 1971. The Company has firm contracts for an adequate supply of gas for all generating capacity which is or will be operational prior to 1974 (3404 MW), which contracts have various expiration dates from 1978 to 1993. During the winter of 1970-71 gas was curtailed to some extent by one supplier who supplies gas to approximately 550 MW of generating capability. After June 1971 the Company expects to be able to offset any foreseeable gas curtailment by burning oil. The supply of fuel for generating units that will become operational in 1974 and thereafter is being negotiated at this time."
>
> FPC Exhibit 21.

12. On March 31, 1971, LPL although it was an active participant in the curtailment proceeding before the FPC, filed its complaint in this Court, seeking to enjoin United's curtailment program insofar as it affected LPL's Sterlington and Nine Mile Point Stations. The trial Court, after considering the pleadings of LPL and the briefs and arguments of its counsel granted a Temporary Restraining Order on April 27, 1971.

13. On April 28, 1971, the FPC intervened and filed a Motion to Dismiss for lack of subject matter jurisdiction. United-Pennzoil, on April 29, 1971 filed its Motion to Dismiss.

14. The Court considering the additional pleadings then before it, dissolved the temporary restraining order on April 29, 1971, and dismissed the case for lack of jurisdiction. LPL filed a Notice of Appeal and moved for a stay order which the Court refused. The matter is now before this Court on an Order of the Fifth Circuit Court of

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chasing Louisiana Power and Light securities or reporting any change in your fuel oil situation subsequent to May 12, 1971?'

A. I am not aware of it." (Tr. p. 103).

Appeals dated May 14, 1971 vacating the trial Court's judgment of dismissal and remanding the case to the District Court for an expedited hearing on the jurisdictional issue and such other preliminary issues as might be properly raised.

15. The original trial judge having recused himself, the matter was assigned to this Court for hearing and a full evidentiary hearing was conducted on May 27, 1971.

Conclusions of Law

LPL seeks an injunction restraining and enjoining United and Pennzoil from curtailing the supply of gas to the Sterlington and Nine Mile Point generating stations of LPL in breach of United's contracts with LPL, and ordering said companies to deliver natural gas to LPL in accordance with the provisions of said contracts.

LPL is not entitled to injunctive relief unless it clearly establishes that it is threatened with irreparable injury. It alleges that its Sterlington Station has no alternative source of energy (Complaint Paragraph 17), and that the implementation of the curtailment might result in an extensive "Brown-out" or "Black-out" (Complaint Paragraph 16). LPL has failed to establish irreparable injury (Finding of Fact No. 11) and, therefore, is not entitled to injunctive relief. However, the Court does not choose to rest judgment solely on these grounds, since the Court of Appeals has directed that a specific finding should be made on the jurisdictional issue.

LPL forcefully contends that this Court has primary jurisdiction and that the FPC lacks jurisdiction because (1) the gas delivered to the Nine Mile Point Station is "interstate gas" not subject to the jurisdiction of the FPC and (2) direct sales such as the sales from United to LPL are exempt from the jurisdiction of the Commission under the provisions of Section 1(b) of the Natural Gas Act (15 U.S.C. 717).

It is not clearly established by the record that the gas delivered to the Nine Mile Point Station is "interstate gas", since some "interstate gas" is dumped into the system which supplies the Nine Mile Point Station (Findings of Fact No. 4). The determination of this question is within the fundamental jurisdiction of the FPC, requires the expertise of that agency and is presently pending before

that agency in Docket No. RP 71-89. The same problems were properly disposed of in the Florida Parishes cases, In the Matter of United Gas Pipe Line Company, Docket No. CP62-161, 30 FPC 560, affirmed on appeal, sub nom., *Louisiana Public Service Commission et al. v. Federal Power Commission, et al.*, 359 F. 2d 525, cert. denied, 385 U.S. 833, 17 L. Ed. 68, 87 S. Ct. 73.

LPL's second contention is predicated on a finding that the question at issue is the violation of provisions of its direct sales contract with United. However, United's application to the FPC in RP 71-29 is couched in terms of a curtailment proceeding (FPC Exhibit 3, Item 1). The exhibits and testimony pertain to volumes of gas—supply and delivery. It seems fairly obvious that if the Court required delivery of the full gas contract commitment to LPL, the gas supply available to United's other customers would be reduced and the curtailment of gas supply to other customers would be proportionately affected. Thus, all of United's customers have an interest, including more than 50 intervenors in RP 71-29. A cursory examination of the testimony and the exhibits produced at the hearing before this Court on May 27 will demonstrate the complexities and the technical nature of the matters involved in United's application and the special expertise required to resolve it. This is a curtailment proceeding. The proposed curtailment program certainly affects deliveries to United's customers under direct sales contracts such as LPL. However, this is a collateral effect of the curtailment and does not necessarily convert it into an attempt by the FPC to exert jurisdiction over such direct sales contracts.

The threatened irreparable injury alleged by LPL (possible "brown-out" or "black-out") is related solely to the volume of gas delivered. There is no proof that LPL actually requires its full contract commitment of gas to avoid this consequence. It received less than contract commitments during the winter months of 1970-71 without experiencing such injury. This Court cannot assume, especially in an injunction proceeding, that the full contract commitment of gas is required by LPL to avoid its alleged injury. The injunction could not be granted if standby fuel, as alleged by defendants, is available. The contracts are strictly collateral to the issue before the Court.

United, Pennzoil and the FPC urge that LPL is not

entitled to judicial relief until it has exhausted its administrative remedies in the FPC. The Courts have not uniformly followed this precept. Professor Davis in his *Administrative Law Treatise*, Volume 3, Section 20.03, Page 69, suggests factors which should be considered in determining whether this precept should be followed:

> "The key factors are three: extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction. Unfortunately, each of these three key factors is a variable, and each often calls for a considerable amount of judgment for its proper appraisal.
>
> A workable standard probably should not go beyond a statement that each of these three factors should be weighed in determining whether or not a court should decide an issue of administrative jurisdiction without requiring exhaustion of administrative remedies. A neat word formula probably is not feasible."

As noted above, LPL has made no attempt to establish the minimum volume of gas which is required to maintain its service, or that the amount allocated to it under the curtailment program is insufficient to meet its minimum requirements. The contracts are hardly pertinent to these issues. The Court finds that LPL has not proved the extent of possible injury which might result from pursuit of the administrative remedy, that the curtailment proceedings are well within the jurisdiction of the FPC and that the expertise of the FPC is necessary for the proper consideration and disposition of the issues presented in this proceeding. LPL must exhaust its administrative remedies despite its assertion that the FPC lacks jurisdiction. *Myers v. Bethlehem Steel Corp.*, 303 U.S. 41, 82 L. Ed. 638, 58 S. Ct. 459; *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540, 90 L. Ed. 839, 66 S. Ct. 712; *Federal Power Commission v. Arkansas Power & Light Co.*, 330 U.S. 802, 91 L. Ed. 1261, 67 S. Ct. 962, rev'g 156 F. 2d 821; *Union Oil Co. of California v. Federal Power Commission*, 236 F. 2d 816 (5th Cir. 1956), Cert. denied, 352 U.S. 696, 1 L. Ed. 323, 77 S. Ct. 360; and *Lone Star Cement Corp. v. Federal Trade Commission*, 339 F. 2d 505. The FPC is competent to

decide its jurisdiction and should do so. *City of Hastings, Nebraska v. Federal Power Commission*, C.A.D.C. 221 F. 2d 31; *Marine Engineers v. Interlake S.S. Co.*, 370 U.S. 173, 8 L. Ed. 2d 418, 82 S. Ct. 1237.

The motions of United, Pennzoil and the FPC to dissolve the temporary restraining order and to dismiss this suit are granted and the temporary restraining order heretofore issued on April 27, 1971 is dissolved.

Counsel for defendants, Unifed and Pennzoil and for Intervenor FPC immediately shall prepare a proper decree and obtain approval thereof, from counsel for plaintiff, LPL, in accordance with Rule 9 of this Court and present such judgment for signature as expeditiously as possible.

THUS DONE AND SIGNED at Alexandria, Louisiana, this 25th day of June, 1971.

/s/ Nauman S. Scott
UNITED STATES DISTRICT JUDGE

Filed June 28, 1971

(Title Omitted)
No. 16,637

JUDGMENT

On the 27th day of May, 1971, this case came on for hearing directed by the U.S. Court of Appeals for the Fifth Circuit by its order entered May 14, 1971, on the jurisdictional issue and on such other preliminary issues as may properly be raised and all parties appeared by and through counsel and announced to the Court that they were ready to proceed. Thereupon, on the said 27th day of May, 1971, the hearing began and later on the same day the hearing was concluded. All parties were given until June 14, 1971 to file additional briefs, and thereafter, the Court having considered the pleadings, the evidence adduced at the May 27, 1971 hearing and the written briefs, and having filed on June 28, 1971, findings of fact and conclusions of law, in accordance with Rule 52 of the Federal Rules of Civil Procedure, and, having concluded, for the reasons stated in those findings and conclusions, that the motions of United/Pennzoil and the Commission to dissolve the temporary restraining order and to dismiss this suit should

be granted and that the temporary restraining order heretofore issued on April 27, 1971 should be dissolved; it is accordingly

ORDERED that the motions of United/Pennzoil and the Commission to dismiss this suit be and they are hereby granted and that this suit be and it is hereby dismissed; it is further

ORDERED that the motions of United/Pennzoil and the Commission to dissolve the temporary restraining order be and they are hereby granted and that the temporary restraining order heretofore issued on April 27, 1971 be and it is hereby dissolved

DONE AT Opelousas, Louisiana, this 30th day of June, 1971.

/s/ Nauman S. Scott
United States District Judge

APPROVED AS TO FORM:

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Theus, Grisham, Davis & Leigh
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Alternative Judgment
Submitted 6/30/71

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Federal Power Commission

(Signed by permission of counsel)

Filed
June 30, 1971

(Title Omitted)
No. 16,637

MOTION FOR SUPERSEDEAS OR INJUNCTION PENDING APPEAL

Mover, Louisiana Power & Light Company, moves the Court to stay the enforcement of the judgment in this action, or alternatively to maintain in effect the restraining order previously granted herein and reinstated by the United States Court of Appeals for the Fifth Circuit on May 14, 1971, pending the disposition of the appeal of plaintiff to the United States Court of Appeals for the Fifth Circuit, and for that purpose to fix the amount of the bond required to be filed by Mover.

In connection with this motion, Mover shows that by order of the United States Court of Appeals for the Fifth Circuit dated May 14, 1971, this case was remanded to the District Court for expedited hearing on the jurisdictional issue and on such other preliminary issues as might properly be raised, and further directed that an expedited

hearing on the merits should be had in the event the Court should decide that it had jurisdiction.

The hearing held by this Court on Thursday, May 27, 1971, was thus limited to the jurisdictional and strictly preliminary issues and did not deal with the merits in this matter. Despite this Court's finding (finding of fact, paragraph II) that no irreparable injury has been shown by Mover, nevertheless, Mover again avers that by the curtailment proposed by defendants herein it will, in fact, suffer irreparable injury as alleged in its original and supplemental petitions heretofore filed herein.

Similarly, despite this Court's finding of fact number 9, Mover again denies United's assertion that United's supply of gas is inadequate to meet its present and pending delivery commitments.

Accordingly, Mover shows that pending its appeal, the restraining order heretofore granted herein should be continued in effect until such time as the United States Court of Appeal for the Fifth Circuit can consider and rule upon the jurisdictional issue decided by this Court.

WHEREFORE, Mover prays that an order of Supersedeas be granted herein staying the effective date of the judgment herein and continuing the restraining order in effect pending the final disposition of this matter on appeal.

Prays for all needed orders.

THEUS, GRISHAM, DAVIS & LEIGH

THOMAS W. LEIGH

By /s/ Thos. W. Leigh

MONROE & LEMANN

ANDREW P. CARTER
EUGENE G. TAGGART
CHAS. KING MALLORY

/s/ C. K. Mallory

ATTORNEYS FOR LOUISIANA POWER & LIGHT COMPANY, Plaintiff

Filed June 30, 1971

(Title Omitted)
No. 16,637

BOND FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, Louisiana Power & Light Company as principal, and The Travelers Indemnity Company as surety, are held and firmly bound unto United Gas Pipe Line Company, Pennzoil United, Inc., and the Federal Power Commission in the full sum of Two Hundred Fifty and No/100 ($250.00) Dollars, to be paid to the said United Gas Pipe Line Company, Pennzoil United, Inc. and the Federal Power Commission, their successors, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our successors, assigns, heirs, executors, and administrators, jointly and severally by these presents:

Sealed and dated this
30 day of June, 1971.

WHEREAS, on June 30, 1971, in an action pending in the United States District Court for the Western District of Louisiana, between Louisiana Power & Light Company as plaintiff and United Gas Pipe Line Company and Pennzoil United, Inc. as defendants, and Federal Power Commission as intervenor, a judgment was rendered against the said Louisiana Power & Light Company and the said Louisiana Power & Light Company having filed a notice of appeal from such judgment to the United States Court of Appeals for the Fifth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the said Louisiana Power & Light Company shall prosecute its appeal to effect and shall pay costs if the appeal is dismissed or the judgment affirmed, or such costs as the said Court of Appeals may award against the said Louisiana Power & Light Company if the judgment is modified, then this obligation is to be void; otherwise, to remain in full force and effect.

LOUISIANA POWER & LIGHT COMPANY,
Principal

By /s/ Thos W. Leigh

THE TRAVELERS INDEMNITY COMPANY

By /s/ W. E. Leigh

Surety

Filed
June 30, 1971

(Title Omitted)
(No. 16,637

Proceedings had at Opelousas, Louisiana, before the Honorable Nauman S. Scott, United States District Judge, Western District of Louisiana, beginning at 2:15 P.M. on the 30th day of July, A.D., 1971.

(Appearances omitted)

PROCEEDINGS:

(The following proceedings were had in Chambers.)

Mr. Leigh: Stipulation: We stipulate that when plaintiffs—that if, when and if it should seek from the Court of Appeals another stay or TRO in this case, that Counsel for United Gas Pipeline Company and Pennzoil United, and Counsel for the Federal Power Commission will be given notice and ample time.

Mr. Barber: Further stipulate that in the event that any extraordinary relief is sought from the Fifth Circuit in connection with this case that ample notice and time will be given to Counsel for United and the Federal Power Commission to prepare.

Mr. Leigh: So stipulated.

The Court: Thank you.

(Proceedings concluded)

Filed
July 8, 1971

(Title Omitted)
No. 16,637

Notice of Appeal

Notice is hereby given that Louisiana Power & Light

Company, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the judgment entered in this action on the 30 day of June, 1971.

/s/ Thos W. Leigh
/s/ A. K. Mallory

Filed
July 9, 1971

Order granting petitions for writs of certiorari

SUPREME COURT OF THE UNITED STATES

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner*,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*

ORDER ALLOWING CERTIORARI. Filed March 6, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, to review the judgment of the United States Court of Appeals for the Fifth Circuit in Federal Power Commission v. Louisiana Power & Light Co., et al. (No. 71-2550). The case is consolidated with No. 71-1040 and a total of one hour is allowed for oral argument.

The motion to expedite is granted, so that these cases may be briefed and argued during the present term of Court.

It is further ordered that the positions for writs of certiorari before judgment to review the opinion and order of the Federal Power Commission (FPC opinion 606) be, and the same are hereby, denied.

Mr. Justice Powell took no part in the consideration or decision of this petition and motion.

SUPREME COURT OF THE UNITED STATES

No. 71-1040

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., *Petitioners*

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*

ORDER ALLOWING CERTIORARI. Filed March 6, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, to review the judgment of the United States Court of Appeals for the Fifth Circuit in Federal Power Commission v. Louisiana Power & Light Co., et al. (No. 71-2550). The case is consolidated with No. 71-1016 and a total of one hour is allowed for oral argument.

The motion to expedite is granted so that these cases may be briefed and argued during the present term of Court.

It is further ordered that the petitions for writs of certiorari before judgment to review the opinion and order of the Federal Power Commission (FPC opinion 606) be, and the same are hereby, denied.

Mr. Justice Powell took no part in the consideration or decision of this petition and motion.

U.S. Government Printing Office: 1972—459-999/552

SUPREME COURT, U. S.

71-1016

Nos. and

Supreme Court, U.S.
FILED
FEB. 7 1972
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Collateral Proceeding)

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Curtailment Proceeding)

MOTION FOR EXPEDITED CONSIDERATION AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ERWIN N. GRISWOLD,
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SAMUEL HUNTINGTON,
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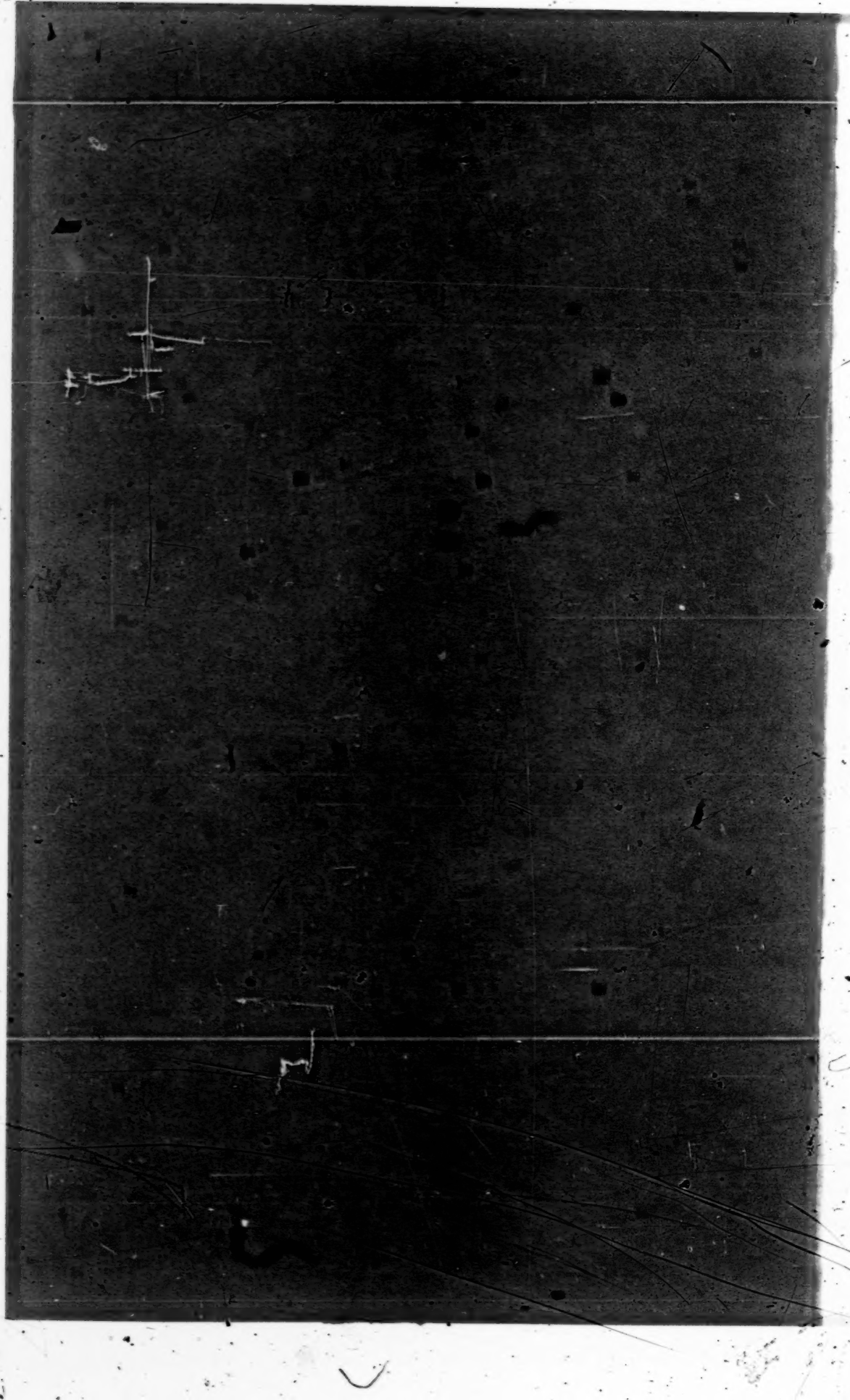

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Collateral Proceeding)

No.

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Curtailment Proceeding)

MOTION FOR EXPEDITED CONSIDERATION

The Solicitor General, on behalf of Federal Power Commission, respectfully moves the Court to expedite consideration of the petitions for writs of certiorari as follows:

(a) By requiring any response to the attached petitions for writs of certiorari to be filed by February 28, 1972; and

(b) By establishing a briefing schedule, if the Court grants one or both of the petitions, that will permit the case or cases to be heard at the April argument session. In the event certiorari is granted at the end of the February argument session, we will file our brief on the merits by March 17 and suggest that respondents' briefs on the merits should be filed by April 12.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Collateral Proceeding)

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Curtailment Proceeding)

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Federal Power Commission* v. *Louisiana Power & Light Company, et al.* (the "collateral proceeding") and for a writ of certiorari before judgment to review the opinion and

order of the Commission in *Federal Power Commission* v. *Louisiana Power & Light Company, et al.* (the "curtailment proceeding"), now pending on petitions for review in the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra,* pp. 1a–27a) and the district court (App. C, *infra,* pp. 30a–42a) in the collateral proceeding are not yet reported. An earlier order of the court of appeals in the collateral proceeding (App. D, *infra,* pp. 43a–47a) is not reported. The opinion of the Federal Power Commission in the curtailment proceeding (App. E, *infra,* pp. 48a–76a) and the opinion of the Commission denying rehearing (App. F, *infra,* pp. 77a–84a) are not yet reported.

JURISDICTION

The judgment of the court of appeals in the collateral proceeding (App. B, *infra,* pp. 28a–29a) was entered on January 14, 1972. The order of the Commission denying rehearing in the curtailment proceeding (App. F, *infra,* pp. 77a–84a) was issued on December 3, 1971, and six petitions for review were timely filed in the court of appeals. The jurisdiction of this Court in both cases is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has jurisdiction under the Natural Gas Act, 15 U.S.C. 717, *et seq.,* to accept, approve, or modify a plan for the curtailing of natural gas deliveries by interstate

pipelines to direct corporate users in order to effect a fair allocation of natural gas supplies among all utimate gas consumers, incuding domestic users, in times of gas shortage.

2. Whether the Federal Power Commission, rather than the courts, should make the initial determination of the Commission's jurisdiction to issue a certificate of public convenience and necessity authorizing a jurisdictional interstate pipeline company to continue to operate certain pipeline facilities.

STATUTES INVOLVED

Sections 1, 4, 5, 7 and 16 of the Natural Gas Act, 15 U.S.C. 717, 717c, 717d, 717f and 717o, are set forth in Appendix G, *infra*, pp. 85a–92a.

STATEMENT

These cases involve the jurisdiction of the Federal Power Commission over allocation of the gas supply of an interstate natural gas pipeline company when the company's gas supply is insufficient to meet its total contractual commitments. In a proceeding initiated by the United Gas Pipe Line Company ("United"), the Commission determined that it had jurisdiction over the curtailment of deliveries of natural gas in interstat nmerce to direct industrial customers as well as over the curtailment of deliveries to customers for resale to others (App. E, *infra*, pp. 48a–76a). Review of the Commission's determination (the curtailment proceeding) is presently pending before the court of appeals.

While the curtailment proceeding was pending before the Commission, Louisiana Power and Light Company ("LP&L") brought an action in the United States District Court for the Western District of Louisiana (the collateral proceeding) to enjoin United from curtailing natural gas deliveries to two of LP&L's generating plants. The district court dismissed the suit on the ground that curtailment proceedings were within the Commission's jurisdiction and that LP&L was required to exhaust its administrative remedies prior to seeking judicial relief. The court of appeals reversed, holding that the Commission has no curtailment jurisdiction over deliveries of natural gas transported in interstate commerce by an interstate pipeline company to direct sales industrial customers (App. A, *infra,* pp. 12a–22a). Prior to the court of appeals' decision, the Commission's opinion reaching the contrary conclusion in the curtailment proceeding was handed down (App. E, *infra,* pp. 53a–66a).

The court of appeals also held in the collateral proceeding that the Commission had no jurisdiction to issue a certificate of public convenience and necessity authorizing United to continue operating certain of its pipeline facilities used to deliver natural gas to one of LP&L's generating plants (App. A, *infra,* pp. 22a–26a), despite the pendency of a proceeding initiated by United before the Commission involving the same issue.

A. PROCEEDINGS BEFORE THE COMMISSION

THE CURTAILMENT PROCEEDING

In October 1970, United, a natural gas company subject to the Commission's jurisdiction, filed a petition with the Commission for an order declaring that its implementation of a curtailment plan was consistent with the terms of its tariff on file with the Commission and its direct sales contracts (App. E, *infra*, pp. 48a–49a). The petition alleged that United did not have sufficient gas reserves to meet its total contractual commitments (*ibid.*). Following notice and interventions by numerous parties, including LP&L, the matter was set for hearing before an examiner. Extensive hearings followed in which all parties and intervenors were given an opportunity to present evidence and file briefs.[1] Since a number of parties, including respondent LP&L, were claiming that the Commission had no jurisdiction over the curtailment of service to direct industrial customers, as distinguished from resale customers (*i.e.*, distributors and other

[1] Subsequent to the presentation by United of its direct testimony, all parties and intervenors, except the Monsanto Company, agreed, as an interim settlement, to a winter curtailment program from November 1, 1970, until March 31, 1971. Monsanto's appeal from the Commission's order approving the interim settlement is now pending before the United States Court of Appeals for the District of Columbia, *sub nom. Monsanto Co.* v. *Federal Power Commission*, No. 71–1306 (C.A. D.C.). On February 22, 1971, United filed a supplement to its original petition to provide a summer curtailment plan from April 1971 through October 1971. On May 17, 1971, United sought approval of another curtailment program, filed pursuant to Order No. 431 (36 Fed. Reg. 7505), which became effective on November 1, 1971. Questions relating to the effective date of this plan are under review in *Mobile Gas Service Corp., et al.* v. *Federal Power Commission*, 71–1607 (C.A. D.C.).

pipelines), the intermediate decision of the examiner was waived and the matter was presented to the Commission for decision (*id,* at 52a).

On October 5, 1971, the Commission issued Opinion and Order No. 606 (App. E, *infra,* pp. 48a–76a) holding, *inter alia,* that it had plenary jurisdiction under the Natural Gas Act to accept, approve or modify the curtailment plans proposed by United or any other jurisdictional pipeline company relating to gas transported to either direct or resale customers.[2] This jurisdiction, the Commission ruled, flowed primarily from the Act's application, under Section 1(b), to the "transportation of natural gas in interstate commerce" and the Commission's authority under Sections 4(b) and 5(a) of the Act to prohibit discriminatory practices (*id.* at 55a, 61a). In rejecting the contention that it could not allocate natural gas in a manner inconsistent with a pipeline's direct sales contracts, the Commission noted that (*id.* at 53a–54a):

> * * * if the gas supply is insufficient to meet the contracted requirements of all consumers, then the direct industrial users might get their gas first, leaving only the remainder to the resale consumers—made up of households, hospitals, schools, public buildings, and industrial and commercial establishments in all States served by the jurisdictional pipelines.

Petitions for review of the Commission's decision, filed pursuant to Section 19(a) of the Natural Gas Act

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[2] Certain issues relating to the propriety of United's particular curtailment plan were remanded to the hearing examiner for further consideration (*id.* at 75a).

(15 U.S.C. 717r(a)), are now pending before the United States Court of Appeals for the Fifth Circuit.

THE CERTIFICATE PROCEEDING

Also in October 1970, United filed an application with the Commission for a certificate of public convenience and necessity authorizing it to continue operating a portion of its pipeline facilities which is located wholly within Louisiana and is used to supply LP&L's Nine-Mile Point generating station (App. E, *infra*, p. 53a). United alleged that these facilities were previously part of an intrastate system but had become subject to federal jurisdiction by virtue of the injection into the system of a quantity of gas in interstate commerce. Numerous parties, including LP&L, intervened and hearings were held. Intermediate decision by the examiner having been waived, the matter is now awaiting decision by the Commission.

B. THE COLLATERAL PROCEEDING

In March 1971, while both of the above proceedings were still pending before the Commission, LP&L collaterally attacked the Commission's curtailment jurisdiction by filing an action in the district court seeking an injunction ordering United to deliver to LP&L the full amount of natural gas provided for in LP&L's contract with United. LP&L also claimed that the Commission has no jurisdiction to issue a certificate of public convenience and necessity covering United's pipeline facilities used to make deliveries to LP&L's Nine-Mile Point plant (App. A, *infra*, pp. 4a–5a).

Following an *ex parte* hearing, LP&L obtained a temporary restraining order ordering United to deliver full contract quantities of natural gas without curtailment to LP&L's generating plants. After the Commission intervened, the district court dissolved the temporary restraining order and dismissed LP&L's suit on grounds that the Commission has exclusive jurisdiction over curtailments and that LP&L had failed to exhaust its administrative remedies.[3] LP&L then obtained an *ex parte* reinstatement of the temporary restraining order by a judge of the court of appeals; in May 1971 a three-judge panel of the court of appeals refused to dissolve the temporary restraining order and remanded the case to the district court for an evidentiary hearing on the jurisdictional issue (App. D, *infra*, pp. 43a–47a).

Following an evidentiary hearing, the district court again held that the Commission has jurisdiction over United's curtailment program, as well as jurisdiction to determine the certificate controversy, and dismissed the complaint (App. C, *infra*, pp. 30a–42a). On appeal, the court of appeals reversed, holding that the Commission is without jurisdiction to order curtailments

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[3] Similar suits initiated by two of United's other direct sale customers have recently been dismissed by another district court. *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.* (D.D.C.), Civil Action No. 2253–71, dismissed January 21, 1972; *Monsanto Co.* v. *United Gas Pipe Line Co.* (D.D.C.), Civil Action No. 2037–71, dismissed January 21, 1972. Both cases have been appealed to the United States Court of Appeals for the District of Columbia Circuit, where appellants, relying on the Fifth Circuit's decision in this case, have sought a stay and an injunction pending appeal.

of gas deliveries to direct sales industrial customers (App. A, *infra*, p. 22a). The court noted that under Section 7 of the Act the Commission has jurisdiction to grant initial certificates of public convenience and necessity for direct sales and to authorize abandonment of such sales, but held that between these two extremes, direct sales are immune from federal regulation (*id. at* 16a–22a). While the court stated it was withholding judgment on the "conclusions" reached by the Commission in its opinion in the curtailment proceeding (*id.* at 27a), the court set forth the rationale of the Commission's decision in favor of curtailment jurisdiction and squarely rejected it (*id.* at 6a–7a, 22a).

The court of appeals also held that the Commission has no jurisdiction to issue a certificate of public convenience and necessity covering the portion of United's pipeline facilities used to deliver natural gas to LP&L's Nine-Mile Point generating plant. The court reasoned that the flow of gas through such facilities was essentially in intrastate, rather than interstate, commerce and thus was exempt from federal regulation *id.* at 22a–26a). The claim that the Commission should be given the opportunity to determine in the first instance whether it has jurisdiction over the facilities was rejected (*id.* at 26a).

REASONS FOR GRANTING THE WRITS

The issue presented by these cases is of fundamental importance to the administration of the Natural Gas Act and to the utilization of the natural gas resources with which that Act is concerned. The deci-

sion below, which conflicts in principle with prior decisions of this Court, deprives the Commission of jurisdiction to allocate gas transported by interstate pipelines among all consumers in a fair and equitable manner when gas shortages make full deliveries to all customers impossible. Unless the controversy is expeditiously resolved, orderly and just implementation of curtailment programs in the months ahead will be exceedingly difficult. At the present time, 26 cases are pending before the Commission [4] and several cases are pending in the federal courts [5] which will be controlled by a decision on the merits in these cases.

Although we are petitioning for writs of certiorari in both the curtailment and collateral cases, we believe the issue on which we seek review—*i.e.*, the Commis-

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[4] Many of these proceedings were initiated in response to an order issued by the Commission (Order No. 431; 36 Fed. Reg. 7505) in the spring of 1971 requiring the submission of curtailment plans by pipelines anticipating a need for curtailments during the current winter. Reproduced as Appendix H, *infra*, p. 93a, is a map showing the pipelines presently in curtailment.

[5] In addition to the collateral attacks by United's customers (see n. 3, *supra*), a suit to enjoin enforcement of a Commission-approved curtailment plan has been filed by a resale customer of another pipeline, maintaining that the Fifth Circuit's decision applies to resale customers as well as to direct sales customers. *Atlanta Gas Light Co., et al.* v. *Southern Natural Gas Co. and Federal Power Commission*, Civil Action No. 16060 (N.D. Ga.). And in addition to review proceedings pending in the Fifth Circuit, two other appeals from Commission orders in the curtailment proceeding initiated by United are pending. *Monsanto Co.* v. *Federal Power Commission*, n. 1, *supra*; *Mobile Gas Service Corp., et al.* v. *Federal Power Commission*, n. 1, *supra*. In a curtailment proceeding involving Northern Natural Gas Company, an appeal has been filed by Michigan Power Company. *Michigan Power Co.* v. *Federal Power Commission* (C.A.D.C., No. 71-1752).

sion's ultimate authority over curtailments—is squarely presented in the collateral case decided by the court of appeals. Since the court of appeals' decision on the jurisdictional issue in the curtailment case is foreordained by its decision in the collateral case, we urge the Court also to grant a writ of certiorari before judgment in the curtailment case so that the issue of the Commission's jurisdiction will be presented in the context of a full administrative record (see discussion at pp. 20–22, *infra*).

1. In order to appreciate the practical effect of the decision of the court of appeals, some background is necessary. Interstate pipelines which do not have sufficient supplies of natural gas to meet their contractual commitments to their customers are permitted to make emergency purchases for up to 60 days at any price without Commission approval (see Commission Orders Nos. 402 and 402A; 35 Fed. Reg. 7511, 8927; see also 18 C.F.R. 157.22) and for longer periods with Commission authorization (see Commission Order No. 431; 36 Fed. Reg. 7505). Fourteen interstate pipelines have made emergency purchases of natural gas. Seven, including United, are unable to meet their contractual commitments and are in curtailment during the current winter and thereafter (see App. H, *infra*, p. 93a).

Under the decision of the court of appeals, the Commission's authority over curtailments is limited to the allocation among a pipeline's resale customers (*i.e.*, distribution companies serving homes, public buildings and some businesses as well as other pipelines purchasing gas for resale) of the pipeline's

supply of natural gas in excess of the quantity contractually committed to the pipeline's direct sales customers. Controversies arising under any of the provisions of a direct sales contract, including any clauses dealing with conditions for the diminution of service, would be subject to resolution by state or federal courts of competent jurisdiction or state regulatory agencies.[6] As a result, the contractual provisions of a pipeline's direct sales contracts as interpreted by various courts or state agencies, rather than the Commission's judgment as to what is in the public interest in light of *all* contractual arrangements and the needs of *all* customers, would govern the allocation of scarce gas supplies between direct sales industrial users on the one hand, and resale customers, and ultimately home and other consumers, on the other hand.

The record in the curtailment proceeding graphically reveals the possible impact of the court's decision. United predicted that during the current winter it would be unable to meet approximately 20 percent of its peak day commitments of about 6,000,000 thousand cubic feet (Mcf) and, in fact, could fall short on

[6] There is serious doubt, however, whether state authorities have the requisite power to act in this area, even assuming that the Commission is without jurisdiction. Since the delivery of natural gas to any one customer or class of customers of a pipeline in curtailment necessarily results in a diversion of gas from another customer or class of customers, the impact of a state court or state regulatory agency order to deliver gas to direct users (in one state) would affect interstate commerce and arguably lie beyond state jurisdiction. See, *e.g.*, *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575; *Pennsylvania* v. *West Virginia*, 262 U.S. 553.

cold days by as much as 1,500,000 Mcf per day of meeting the historical (based on past deliveries rather than on contractual commitments) needs of its customers (R. 4106–4107; Ex. 29, R. 6039).[7] Under United's proposed curtailment plan, historical deliveries to direct sales customers could be curtailed up to 933,000 Mcf on cold days; resale customer deliveries could be curtailed up to 560,000 Mcf on cold days. (Ex. 121, R. 6405).

If the Commission lacks authority to approve curtailments to direct sales customers and those customers obtain court orders enjoining United from curtailing deliveries from past historical levels, the distribution companies and other pipelines could be exposed to an additional curtailment of up to 933,000 Mcf per day on cold days. Moreover, in the event the courts required United to deliver to its direct sales customers the full volumes of gas specified in its contracts with such customers (as opposed to historical volumes), an additional 750,000 Mcf per day would have to be subtracted from deliveries to resale customers, thus possibly exposing such customers to a total curtailment of 2,250,000 Mcf per day (750,000 plus 1,500,000 Mcf per day) (Ex. 43, R. 6102–6109; Ex. 130, R. 6463–6468). Evidence in the curtailment case indicates that the maximum curtailments that United's resale customers could absorb without jeopardizing deliveries to homes, schools, hospitals, public buildings and other small consumers is in the range of 650,000 Mcf per day (Ex. 121, R. 6406).

[7] "R." refers to the record before the Commission in the curtailment proceeding as certified to the court of appeals in connection with the pending petitions for review.

United is not the only major pipeline faced with this serious jurisdictional gap. Reproduced as Appendix I, *infra*, p. 95a, is a map indicating the major interstate pipelines whose direct customers account for 7.6 to 100 percent of their total sales in 1970 as reported by the pipelines on FPC Form 2, pursuant to 18 C.F.R. 260.1.

2. Under a proper analysis of the Natural Gas Act, we submit, the Commission has jurisdiction over curtailments by interstate pipelines of natural gas deliveries to direct sales customers. Section 1(b) (15 U.S.C. 717(b)) specifies that the Act's provisions apply to

> * * * the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas * * *.

Thus, while the application of the Act to *sales* is limited to sales of interstate natural gas for resale, the Act applies without limitation to the transportation of all gas in interstate commerce and to natural gas companies engaged in such transportation.

In *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 523, this Court expressly stated that the curtailment of service to direct sales customers is a matter "largely related * * * to transportation and thus within the jurisdiction of the Federal Power Commission to

control * * *." And in *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 28, the Court reaffirmed its conclusions on curtailments contained in the *Panhandle* decision and stated that

> * * * when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation.

As the Court recognized, the problem of curtailments, which involves vast interstate pipeline complexes (see App. H, *infra*, p. 93a), presents a compelling need for federal regulation.[8]

Moreover, when Section 1(b) is read in conjunction with other provisions of the Act, the scope of the Commission's authority over curtailments becomes clear. Section 4(b) of the Act (15 U.S.C. 717c(b)) provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2)

[8] See also *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 473, where the Court held that even though a company made only direct sales of natural gas, it was nevertheless engaged in the transportation of natural gas in interstate commerce and was thus a "natural gas company" subject to the Commission's accounting regulations and the reporting requirements of the Act.

> maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of servi

And under Section 5(a) (15 U.S.C. 717d(a)):

> Whenever the Commission * * * shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order * * *.[9]

These substantive provisions are not limited in application to sales of natural gas, but cover the "transportation" of gas as well; similarly the proscription of unreasonable differences between classes of service is not confined to "rates", but extends to "service [and] facilities." To the extent that a pipeline's cur-

[9] Compare Section 7(c) of the Act (15 U.S.C. 717f(c)), which prohibits a natural gas company from engaging "in the transportation or sale of natural gas, subject to the jurisdiction of the Commission" without a certificate of public convenience and necessity. Although the court of appeals acknowledged (App. A, *infra*, p. 16a) that Section 7 applies to direct sales customers as well as to customers purchasing for resale, it denied the same scope to the similarly worded Sections 4 and 5.

tailment plan violated the standards of Section 4(b) by granting undue preferences to one class of customers—including the direct sales customers—over another, the Commission would appear to have ample authority under both Sections 4 and 5 to correct the practice.[10]

Finally, the Commission's curtailment authority is supported by the broad, residual powers conferred on it by Section 16 of the Act (15 U.S.C. 717*o*), which provides, in pertinent part:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. * * *

Referring to Section 16 in *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, this Court stated:

> * * * the width of administrative authority must be measured in part by the purposes for which it was conferred * * *. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority.

3. The court of appeals also erred in ruling in the collateral proceeding that the Commission has no jurisdiction to issue a certificate of public convenience and necessity covering the portion of United's pipe-

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[10] Cf. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 647, where this Court noted that it "is clear that contracts covering direct industrial sales" come within the portion of Section 5(a) referring to "any rule, regulation, practice, or contract *affecting*" (emphasis added) any rate, charge or classification imposed by a natural gas company.

line facilities used to deliver natural gas to LP&L's Nine-Mile Point generating plant. By failing to defer to the Commission for an initial determination—subject to later judicial review—whether the presence of interstate gas on the facilities in controversy brings the facilities within the Commission's jurisdiction, the court unjustifiably refused to follow the long standing rule that questions relating to an agency's subject matter jurisdiction should be determined by the agency in the first instance. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. We urge the Court to review this aspect of the court of appeals' decision as well as the court's disposition of the curtailment issue.

4. In our view, as we have noted, the question of the Commission's authority over curtailments is squarely presented in the collateral case decided by the court of appeals. Until the Commission issued its opinion in the curtailment proceeding, there was a substantial issue whether the courts should defer to the Commission for an initial determination of the Commission's curtailment jurisdiction. That issue, however, became unimportant in this case when the Commission's curtailment opinion came down prior to the court of appeals' decision. The parties in the collateral proceeding referred to the Commission's opinion in their briefs and the court of appeals, in its opinion, considered and squarely rejected the rationale of the agency opinion (App. A, *infra*, pp. 6a–7a, 22a). Accordingly, we are not including that issue (whether the courts should initially defer to the Com-

mission's determination of its curtailment jurisdiction) in the questions presented in the present petition for certiorari.

To avoid any possible doubt that the curtailment jurisdiction issue is squarely presented and to present that issue in the context of a fuller record, however, we urge the Court also to grant certiorari before judgment in the proceedings for review of the Commission's curtailment opinion now pending before the court of appeals.[11] To the extent that the petitions for review raise issues in addition to the question of the Commission's basic authority over curtailments of natural gas deliveries to direct sales customers, the cases can be remanded to the court of appeals for further proceedings after disposition of the basic issue by this Court.

This Court's power to issue a writ of certiorari before judgment in cases coming directly to the courts of appeals from administrative agencies has never been definitively determined. See Stern and Gressman, *Supreme Court Practice*, pp. 28–30 (4th ed., 1969). It can perhaps be argued that, in reviewing the agency decision prior to any action by a lower court, this Court would be exercising original, rather than appellate, jurisdiction outside the limits of this Court's original jurisdiction as defined by Article III, Section

[11] Petitions for review have been filed in the Fifth Circuit by Louisiana Power & Light Co., *et al.*, International Paper Company, Gulf States Utilities Company, Mississippi Power & Light Company, Mississippi Valley Gas Co., *et al.*, and the State of Louisiana, *et al.* By order issued January 28, 1972, the first four cases were consolidated for further proceedings.

2, of the Constitution. In our view, however, review of an agency decision in a case where the agency has acted in a quasi-judicial capacity is appellate in nature since the reviewing court simply "revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Marbury* v. *Madison*, 1 Cranch 137, 175. Compare *Wheeler Lumber Bridge & Supply Co.* v. *United States*, 281 U.S. 572, 576. Moreover, judicial review of the Commission's determination here is based on a record compiled before the Commission.

THE COURT SHOULD EXPEDITE CONSIDERATION OF THESE CASES

The potential consequences of the court of appeals' exclusion of direct industrial sales from the Commission's curtailment jurisdiction, and the resulting impact on distributors and home and other consumers have been discussed (pp. 13–16, *supra*) and need not be repeated. The urgency of the situation is such, however, that it is highly desirable that these cases be heard on the merits this spring.

The summer months are critical to the natural gas industry, since it is during this period that storage facilities throughout the country are filled to assure that the ensuing winter's peak-load requirements will be met. If the pipelines will not be in a position this summer to curtail or interrupt deliveries to all their

customers, including their direct sales customers, in accordance with their curtailment plans on file with the Commission, the impact on the resale customers of these pipelines will be severe. Exemption of direct industrial sales from curtailment plans will expose resale customers to a wholly unreasonable curtailment burden (see pp. 14–16, *supra*) and could result in critical shortages to some pipelines and distributors. Moreover, if the cases are not heard until next Term, the fall and early winter months may pass without clarification of the Commission's curtailment jurisdiction, thus further jeopardizing a rational allocation of limited natural gas supplies during the 1972–1973 winter.

Accordingly, we urge the Court to grant our motion for expedited consideration requiring responses to the petitions for writs of certiorari to be filed by February 28, 1972, and establishing a briefing schedule, if one or both of the petitions are granted, that will permit the case or cases to be heard at the April argument session.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari and the motion for expedited consideration should be granted.

Respectfully submitted.

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FEBRUARY 1972.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 71-2350

LOUISIANA POWER & LIGHT COMPANY, PLAINTIFF-APPELLANT

v.

UNITED GAS PIPE LINE COMPANY, ET AL., DEFENDANTS-APPELLEES

FEDERAL POWER COMMISSION, INTERVENOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

[January 14, 1972]

Before THORNBERRY, MORGAN and CLARK, *Circuit Judges.*

CLARK, Circuit Judge.

The present nationwide shortage of natural gas generated this controversy.[1] First, we must make a construction of the Natural Gas Act[2] which will

[1] This is a matter we have judicially noticed as eminent: *see* Southern Louisiana Area Rate Cases v. Federal Power Commission, 428 F. 2d 407 (5th Cir. 1970).

[2] 15 U.S.C.A. § 717-717w.

properly balance that Act's grant of jurisdictional power to the Federal Power Commission (FPC) over the transportation of natural gas in interstate commerce with the equally explicit Congressional directive that the Act shall not apply to so-called direct sales of gas—sales which are for consumptive use by the purchaser rather than for resale to others. This requires a determination of whether the grant of transportation jurisdiction confers a power to the FPC to now recondition certificates of public convenience and necessity it previously issued authorizing the construction and use of pipeline facilities to perform gas sales contracts between an interstate gas pipeline, United Gas Pipeline Company (United), and a utility company, Louisiana Power & Light Company (LP&L), which burns the contract gas under its boilers to generate electricity. Second, we must determine whether minor diversions of interstate gas have converted a wholly state-contained pipeline system to an interstate facility.

On preliminary motions by United and FPC, the district court dismissed LP&L's complaint seeking an injunction requiring United to perform its contracts. The dismissal was based both upon a finding that LP&L had failed to demonstrate irreparable injury and upon the legal conclusion that proceedings pending before the Federal Power Commission, concerned with the same general subject matter, were "well within the [primary] jurisdiction of the FPC." We determine that the lower court erred; both in basing its decision on LP&L's failure to demonstrate irreparable injury at a preliminary hearing on its opponents' motions to dismiss, and in concluding that the FPC's claim of continuing certificate jurisdiction and its claim of jurisdiction over an asserted intrastate facility was free from doubt. We therefore reverse

the order of dismissal and remand this action for further fact development on the issue of irreparable injury.

BACKGROUND

In 1956 LP&L entered into a twenty-year contract with United calling for the delivery of natural gas to be burned under LP&L's boilers at its Sterlington Electric Generating Station in Ouachita Parish, Louisiana. The contract contained a provision entitled "Impairment of Deliveries" which provided that in the event a shortage of gas rendered United unable to supply the full requirements of all of its customers, then gas utilities reselling gas to domestic consumers and electric utilities using gas for the generation of electricity for domestic consumption would be first supplied by United, with any remaining available gas to be prorated among its other customers.

For many years United has also contracted with LP&L to sell it natural gas for LP&L's steam electric generating use at its Nine-Mile Point Generating Station in Jefferson Parish, Louisiana. This contract also contained an impairment of deliveries clause which provided that, in the event a shortage of gas made the available supply inadequate, available gas would be ratably prorated between gas utilities purchasing gas for resale to domestic consumers, and electric utilities using gas to generate electricity for domestic consumers.

Certificates of public convenience and necessity have been issued by the FPC covering all of United's facilities used to make deliveries to LP&L's Sterlington Station.[3] Deliveries to LP&L's Nine-Mile Point

[3] United Gas Pipe Line Co., 3 FPC 863 (1942); United Gas Pipe Line Co., 19 FPC 31 (1957). United Gas Pipe Line Co., 33 FPC 734 (1965), United Gas Pipe Line Co., 37 FPC 399 (1967), United Gas Pipe Line Co., 38 FPC 88 (1967).

Station have never been certificated, since, until recently, all of the gas delivered to this station only traveled in a pipeline system, designated the "Green System," which gathered and disposed of gas wholly within the confines of the State of Louisiana. However, in 1970 United chose to divert 2.6% of the gas supplied under its Nine-Mile Station contract into the Green System from its interstate system, designated the "Black System."

In 1970 United petitioned FPC for declaratory approval of a curtailment plan to meet an anticipated shortage of gas during the 1970–71 winter heating season and for an indeterminate time thereafter.[4] LP&L and other direct sales customers of United intervened. In its petition for intervention, LP&L maintained that the proposed curtailment program reached both direct sale and sale for resale customers and would violate the terms in its contracts. LP&L denied that the FPC had jurisdiction to curtail direct sales contract deliveries through previously certificated transportation facilities.

United has also filed an application with the FPC to grant a certificate of public convenience and necessity to utilize the Green System pipeline facilities serving the Nine-Mile Point Station of LP&L. This proceeding bears Docket No. CP 71–89. LP&L has intervened. No decision has been rendered.

In March 1971, LP&L filed a complaint in the district court asserting jurisdiction based on diversity of citizenship. It sought and received a temporary restraining order requiring United to perform its contracts. The day following the issuance of this order, the FPC intervened in the case and the district court reversed its prior restraining order and dismissed the cause for lack of jurisdiction. After the district court

[4] Docket No. RP 71–29.

refused to stay its order of dismissal a single judge and, subsequently, a panel of this Circuit, stayed the dismissal of the district court action and entered an order providing in pertinent part:

> The case is remanded to the district court for an expedited hearing on the jurisdictional issue and on such other *preliminary* issues as may properly be raised. This Court expresses no opinion on the jurisdictional issue. At such hearing counsel for the parties and the intervenor may present evidence hearing on the jurisdiction of the court and on other appropriate *preliminary* questions. The district court will make appropriate findings of fact and state its conclusions of law. (Emphasis supplied.)

We add emphasis to the above quotation to point up that we did not direct that the court hear the case on its merits at the time it held the required jurisdictional hearing.

On remand, the district court held the hearing mandated and made Findings of Fact which included the following:

> All gas delivered by United to the Sterlington and Nine-Mile Point Stations is produced in Louisiana. All deliveries of gas to the Sterlington Station are interstate gas. Deliveries of gas to the Nine-Mile Station are made through the "Green" pipeline which is located entirely within the State of Louisiana. The great bulk of the gas in the "Green" line is intrastate gas. However, some gas is dumped into the "Green" pipeline from the "Black" pipeline. This is interstate gas so there is a co-mingling of intrastate and interstate gas in the "Green" pipeline.
>
> * * * * *
>
> LPL has alleged (Complaint Paragraph 17) that the proposed curtailment by United could ultimately effect a "black-out" or "brown-out"

> which, under certain circumstances, could cover an area as large as the whole State of Louisiana, or, indeed, a several-state area such as occurred during the notorious "north-east blackout" in 1965. The record is bare of any evidence to support this allegation.

The court additionally noted that LP&L has filed a registration statement with the Securities & Exchange Commission which not only did not disclose the pendency of the subject litigation as a suit which carried the potential of severe service interruptions, but also affirmatively stated that after June 1971 it expected to be able to offset any foreseeable gas curtailment by burning oil at its generating stations.

The Court concluded as a matter of law that the motions to dismiss filed by United and FPC should be granted because LP&L had failed to establish irrepable injury and therefore was not entitled to injunctive relief. It alternatively based its dismissal upon the conclusion that LP&L was required to exhaust its remedies before the FPC rather than pursuing judicial relief since: (1) LP&L had not proved the extent of possible injury which might result from the pursuit of curtailment proceedings before FPC; (2) those curtailment proceedings were well within the jurisdiction of the FPC; and (3) the expertise of the FPC was necessary for the proper consideration and disposition of the issues. All injunctive relief was vacated and the action brought by LP&L was dismissed. The present appeal arises from this action.

During the pendency of this appeal, the FPC rendered its Opinion No. 606 in United's curtailment proceedings, Docket No. RP71-29. In this opinion the Commission concluded that it had plenary authority to allocate the gas supply of jurisdictional pipelines to *all* of the pipeline's customers, including customers who were previously certificated direct sale pur-

chasers under long-term contracts, and that it should make such allocations in the form of tariff orders requiring curtailments of gas deliveries to all users of natural gas which United transported in commerce. The basis of the FPC's reasoning was that its power to make such curtailments was related to its jurisdiction over transportation, and that its transportation jurisdiction "is and must be" of a *continuing* nature rather than being "insignificantly" limited to the initial grant or denial of a certificate of public convenience and necessity to construct the facilities used to make direct sales. The FPC determined that it must have jurisdiction to exert continuing control over the gas sold under such certificated direct sales in order to accord full protection to the public since state commissions could not reasonably be expected to formulate a uniformly fair plan for the apportionment of the scarce commodity. Thus, FPC asserts that the present gas shortage has created "new circumstances" giving rise to the "need" to continuously reevaluate previous certificates to make all pipeline sales fully compensatory and thereby use financial incentive to encourage exploration for and development of new natural gas supplies.

PROOF OF IRREPARABLE INJURY

Both premises for the court's jurisdictional dismissal were based (one in whole and the other in part) on the determination that LP&L had failed to carry the burden of demonstrating its potential injury. In its sworn complaint in the district court, LP&L detailed its assertions of immediate and irreparable damage. In brief paraphrase, its allegations were these. LP&L supplied the electricity it generated to 46 of 64 parishes in Louisiana and had interconnections with all other electrical utility companies in

Louisiana and most of the rural electric cooperatives in that State. Through this network it served the electrical needs of numerous domestic and industrial customers, as well as governmental subdivsions. Through other interconnections, it participated in an area-wide electrical grid network serving over 2,500,000 consumers, which was still further connected to power sources throughout most of the eastern part of the nation. A failure to be able to utilize the full generating capacity of the Sterlington and Nine-Mile Stations at peak demand periods could cause a wide area "black-out" or "brown-out" with damages beyond any means of calculation. It was further asserted that LP&L had relied upon United's contract when it constructed Sterlington Station, which had no full-capacity alternate source of energy, for electrical generation and that, so long as United breached its contract commitment by curtailing gas deliveries, LP&L would lose electrical sales which could never be recovered because of the evanescent quality of its stock in trade, electricity, which could not be stored nor could it be delivered at any moment after the immediate demand for it had passed. The loss of such sales would be further irreparable since the fixed cost of basic generating facilities depreciated whether used or not.

The court found that the record on the preliminary hearing of the motions to dismiss for want of subject matter jurisdiction, under Fed.R.Civ.P. 12(d) was bare of any evidence to support the portion of these allegations relating to a possible "black-out" or "brown-out" of electrical power. This finding is correct; just as it is further true that the record is devoid of any evidence to support the remaining verified allegations of irreparable injury through lost sales. But, it is obvious why. At the commencement of the hear-

ing[5] and in ruling on objections during its progress, the court made it abundantly clear that all evidence to be taken should be directed solely to the jurisdictional issue raised by the respective motions to dismiss of United and FPC. Neither the defendant nor the intervenor had answered. No responsive pleadings other than these jurisdictional motions were on file. The case was not then being heard on its merits (or lack of them) as to the ultimate relief prayed for by the plaintiff.

The basic tenet of both prongs of the lower court's ruling—that LP&L had failed to demonstrate it would be harmed by any curtailment of gas deliveries under United's contract—was drawn from the examination and cross-examinations of J. M. Wyatt, a senior vice president of LP&L. On direct examination, Mr. Wyatt testified that at the time of this Rule 12(d) hearing, the Sterlington Station plant had no capability to utilize any alternate fuel other than natural gas and that the Nine-Mile Point Station was equipped to operate only one of its several units, and that unit only on an emergency basis for up to 36 hours, on No. 2 fuel oil. He further testified that after June of 1971 the company expected to have similar emergency capability to operate one unit of its Sterlington plant on such fuel oil. On cross-examination of Mr. Wyatt, counsel for the FPC brought out that registration statements filed by LP&L with the Securities and Exchange Commission contained assertions under the heading "Fuel Supply" which were inconsistent with the anticipated injuries which the complaint asserted would flow from the breach of United's contracts. Counsel for United brought out on his cross-examination of Mr. Wyatt, that LP&L had a separate natural

[5] The hearing commenced with the court's announcement to *United's* counsel: "—you are the mover, so you may proceed."

gas supply contract term supply of 66⅔% of the present fuel energy requirement for the operation of LP&L's Nine-Mile Point station, and that another LP&L-Texaco, Inc. gas contract had been made to cover additional fuel when a new generating unit went on-stream at this plant in 1973.

After an examination of the entire record, this Court concludes that the preliminary hearing record compiled in the court below was limited to a determination of the jurisdiction of the court vis-a-vis the jurisdiction of the FPC. The hearing had a somewhat unique procedural posture due to this Court's stay and remand for expedited disposition of the jurisdictional issue. This factor aids in making it abundantly clear that the court and the parties were proceeding on the assumption that the matter was being heard on defenses as to which the movants and not LP&L had the burden of persuasion.

This is not to say that a party moving for an injunction does not have the burden of showing irreparable injury. We only assert that the mandate of this Court remanded the cause to the district court for an expedited hearing on the jurisdictional issue and on other *preliminary* issues that were appropriate or properly raised. With no pleading challenge whatsoever to the facts stated in the complaint, and without notice of any kind to the parties that the matter was to be heard on its merits, the court improperly based its conclusions of law upon its finding of a failure by LP&L to carry a burden it did not know it was required to meet. *Cf. Nationwide Amusements v. Nattin,* —— F. 2d —— (5th Cir. 1971) [No. 71-2299, 1971].

Finally, as to the procedural aspect of this matter, we hold that it was error to use the preliminary hearing proceedings on Rule 12(b) defenses to dispose of

this cause on its underlying factual merits. Except in unusual circumstances, and then only after clear notice this course is improper. *See* 5 Wright and Miller, Federal Practice and Procedure § 1373; 2A J. Moore, Federal Practice ¶12.16.

Aside from the procedural problem, the lack-of-proof-of-potential-injury bases for denial of injunctive relief and for requiring exhaustion of FPC remedies cannot stand on the undisputed matters which were developed. The fact that LP&L made statements to the Securities & Exchange Commission which can be read to be inconsistent with its claim that performance of United's natural gas contracts is an essential prerequisite to the operation of its plants, is a matter that could be considered if the defense of estoppel is raised or the equitable defense of unclean hands should become pertinent.[6] All we hold on this appeal is that the language of the filing posed against the sworn facts of the complaint and Wyatt's testimony would, at most, show that LP&L was guilty of misleading the investing public. If that be so, it is another lawsuit. There was no room for concluding from any fact shown in this record that LP&L had some alternate means of generating electricity except on a makeshift basis, or even on that basis, for more than a day and a half.

Of course, proof of this type could be critical if proven facts left room for conflicting inferences as to whether loss of contract gas would indeed result in injury. The Nine-Mile Point Station contract ar-

[6] Before this court, LP&L asserts that its registration statements do not even demonstrate a lack of candor with the Securities & Exchange Commission, since LP&L was entitled to assume that its contract commitment with United would ultimately be honored. However, we expressly eschew *any* hint of a ruling on this matter. It is no more pertinent to our review than it was to the preliminary decision below.

rangement with Texaco, Inc. would similarly present a substantial question in this respect. It apparently shows the ability to obtain 2/3rds of the needed supply of natural gas for this particular station for the next two years, and an even greater percentage of its needs for those years after the additional generating unit becomes operational.

What all of this may mean as to the relationship which the amount of gas contracted to be supplied to the Sterlington and Nine-Mile Point Stations by United bears to L.P&L.'s ability and imperative need to generate electricity both to prevent catastrophic breakdown and irretrievable loss of sales, can only be determined by development of the evidence on the merits. What is the fuel need at each station? What are the alternate sources of energy supply? How much power can be exchanged (and at what ultimate loss or gain to LP&L) through interconnected sources? What are LP&L's usual and the peak demands? The record does not answer any of these questions, or the doubtless many more, that will play into arriving at the final answer.

In sum, we hold the district court erred in finding and concluding upon this record that LP&L had failed to establish that the breach of these contracts would not cause it immediate and irreparable injury, both because it improperly assigned the burden of proof to LP&L at this stage of the proceeding and because the record does not demonstrate that such injury is not likely to occur.

FPC JURISDICTION

THE DIRECT SALES EXCLUSION VIS-A-VIS CONTINUING CERTIFICATE JURISDICTION (THE STERLINGTON STATION ISSUE)

The intent which motivated Congress at the time legislation was enacted must be the lode star con-

stantly guiding the court which is required to construe their enactment. At first blush, it may seem trite to start this draft of the chart of our search for statutory meaning with so basic an anxiom. But the changed circumstances of a new era are claimed in the strongest terms to have created an urgent "*need*" for the recognition of an authority to extend a granted power so deeply into an area where agency jurisdiction was expressly denied that, to paraphrase an old song, accentuating the affirmative eliminates the negative. This we cannot do. Such action does not fill in statutory interstices or resolve ambiguities in a law. It selects between competing policies which have been legislatively recognized in the same enactment and have been court-declared not only to be separate subjects of regulation, but also to have "independent and equally important places in the Act." *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 *reh. denied* 339 U.S. 905 (1950). Such choices of policy belong to the Congress alone. In speaking to the effect of new experiences under this very Act and to the identical problem we face, the Supreme Court plainly specified that *Congress* was the institution vested with the power to adjust the law to correct deficiencies which were not originally anticipated. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 522, 68 S.Ct. 190, 92 L.Ed. 128 (1947).

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[2] Subsequent circuit decisions have articulated this principle by stating that while the FPC's power over transportation invests it with limited indirect control over non-jurisdictional direct sales, the grant of power and the reservation of such sales are separate aspects of regulation under the Act. *See e.g.*, United Gas Pipe Line Co. v. Federal Power Commission, 388 F.2d 385 (5th Cir. 1968); Panhandle Eastern Pipe Line Company v. Federal Power Commission, 350 F.2d 675 (8th Cir. 1965).

With our compass oriented to legislative intent, we turn to the Act itself and the authorities which have construed it to date. In the *Panhandle Eastern* decision cited above, the Court, while recognizing the undoubted power of Congress to define the distribution of power over interstate commerce, pointed out that the Natural Gas Act created an articulate legislative program creating a comprehensive regulatory scheme in which federal power complemented, but did not usurp, the existing authority of state regulatory agencies, 332 U.S. at 520. Congress was motivated by a desire to protect consumers against exploitation at the hands of natural gas customers, *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 147, 80 S.Ct. 1392, 4 L.Ed.2d 1623 (1960); but it did not decide that this protection was to be accomplished by arrogating all control over interstate commerce in natural gas to the federal agency. "[M]uch authority was reserved to the States." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 19, 81 S.Ct. 435, 5 L.Ed.2d 377 (1961). Since a complete as well as an harmonious regulatory scheme was envisaged, an intent to leave no area of substance unregulated must also be recognized, and no "attractive gaps" should be created by judicial interpretation. *Id.* However, as Mr. Justice Black wrote in *East Ohio Gas Co.*, supra, the location and breadth of such "gaps" must be adjudged in the light of what rights were defined by court precedents which existed *prior* to the time of legislation and not those since decided or which the courts would decide today. Without such a limit, judicial action would certainly become legislation.

The coverage of the Natural Gas Act has been so succinctly and aptly described by Mr. Justice Rutledge that it would be presumptuous not to quote:

> Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.
>
> The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply to *any other* * * * *sale* * * *." (Emphasis added.) Those words plainly mean that the Act shall not apply to any sales other than sales "for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." Direct sales for consumptive use of whatever sort were excluded.
>
> The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise.[3]

As is not uncommon when courts construe legislation over any appreciable time, subsequent decisions have made the clear "line of the statute" more and more crepuscular. One thing can be sharply discerned, the explicit prohibition of the statute denying jurisdiction over direct sales of gas for consumptive use has been consistently narrowed as courts and the FPC have increased the ambit of the jurisdictional grant over interstate transportation of such fuel. This has been done by analyses which recognized broad power in the

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[3] Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana, *supra*, 332 U.S. at 516.

FPC to grant certificates of public convenience and necessity in connection with the extension of pipeline facilities to service direct sales outlets.

The most significant decision construing the FPC's certificate jurisdiction is *FPC v. Transcontinental Gas Pipe Line Corp., supra*, which was decided after Congress had amended § 7 of the Act to greatly broaden the ambit of federal power. That case pointed out that in the original Act, § 7[9] restricted certification to instances where a pipeline sought to serve an area already being served by another regulated company. In 1942 § 7 took its present form requiring certification of every facility subject to the jurisdiction of the Commission. The amendment intended to change the certificate function, which formerly looked only to control of competition between regulated pipeline companies, to one which considered both relative end-use values and price effect factors.

This extension of the certificate function obviously detracted from the direct sale exclusion, but in *Transcontinental*, the Court affirmed that direct sales remained ". . . not subject to the Commission's jurisdiction *except insofar as § 7 requires the Commission to certificate the transportation of gas pursuant to the sale.*" (Emphasis supplied.) Furthermore, in this same opinion, Chief Justice Warren avowed that § 7 powers of the FPC were limited. He observed that the Commission had sought but had not been awarded comprehensive authority over all aspects of gas conservation. His description of the power which Congress had been willing to confer on FPC was the right to exercise a *veto power* over proposed transportation. 365 U.S. at 17.

Against this background matrix of interpretive instruction, we must decide whether a new form of cer-

[9] 15 U.S.C.A. § 717(f).

tificate jurisdiction never heretofore judicially recognized exists under § 7. The issue is: Does the FPC have the authority to modify or condition a certificate of public convenience and necessity issued for facilities used to make a direct sale? Or more briefly stated: Does the Commission have continuing certificate jurisdiction? FPC asserts that it does, and that it "*needs*" to have this jurisdiction to make effective what it conceives to be the full extent of its regulatory powers. We deny this assertion. Even conceding that FPC powers are as broad as it asserts, no amount of need alone can create federal agency power if Congress has not expressly or impliedly granted it. Necessity may be the mother of invention, but need must have the paternal spouse — a legislative grant — to beget agency authority.

The grant of a continuing jurisdiction over certificates already issued might well be implied from the broad powers vested over transportation under § 7. The *Transcontinental* case teaches that FPC has the power to weigh and consider the end uses of gas in order to maintain the greatest benefit from the finite supply of this wasting natural resource. It is further empowered to consider the overall effect which prices to be paid by direct sale purchasers will have on field prices for jurisdictional uses. Such far-reaching powers clearly indicate that episodic State regulation could result in less efficient control than would centralization of all control in the FPC. Considered on these factors alone, the basic rules of statutory interpretation would call for a construction favoring continuing certificate jurisdiction. But! The Act itself expressly proscribes jurisdiction over direct sales and, as to such transactions, the recognition of continuing certificate jurisdiction would do no less than abolish the Act's exception of jurisdiction over sales for con-

sumptive use, which has an equally secure and important place in the structure of the Act.

When any initial certification proceeding is pending before it, even one involving a direct sale, the Commission can exercise a *veto power* over the proposed transaction based upon its judgment as to whether the use proposed to be made is for a valid and efficient use, and whether the price structure would have a deleterious effect in consideration of its overall regulatory scheme. However, as to a non-jurisdictional sale, this power ceases under the Act as it is presently written when the certificate is finally issued, unless and until the right to abandon certificated facilities is requested.

Not only do we fail to find any precedent for establishing a new type of FPC authority in between its § 7 (c)[10] veto power over the initial authorization to begin the use of a facility to transport natural gas in interstate commerce and § 7 (b)'s[11] requirement that FPC authorization be obtained for abandonment of

[10] In pertinent part, this section provides: "(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: . . . ."

[11] (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

such facilities,[12] we find clear authority that no such continuing control over non-jurisdictional sales exists. The rationale of our own decision in *Hunt Oil Company v. Federal Power Commission*, 334 F.2d 474 (5th Cir. 1964), indicates that a certificate has a permanency that is free from continuous FPC adjustment and control. In that case when we determined that the FPC had erred in refusing to permit a state public service commission to intervene in a proceeding which had resulted in the issuance of a certificate of public convenience and necessity, we not only authorized such intervention but required the FPC to set the certificate aside and start the proceedings anew. If there was a continuing revisory power in the Commission, the vacation of the certificate would have been unnecessary since the intervenor's rights could have been accommodated by adjusting the certificate.

Even stronger authority is found in the precedents from other circuits. In *Granite City Steel Company v. Federal Power Commission*, 320 F.2d 711 (D.C. Cir. 1963), that court set aside an FPC order attempting to reallocate gas supplies between direct and resale sale customers. Although this proceeding relied on the proscription of § 7(a) forbidding the FPC to compel a natural gas company to sell gas when such a sale would impair the company's ability to adequately serve existing customers, it is squarely based on the premise that, absent any § 7(b) issue of abandonment, a certificated direct sale cannot be indirectly controlled by the FPC. It is also worthy of note that the court observed that matters occurring after the Commission enters an order cannot be used to retroactively validate that order. Certainly the converse is equally logical—matters occurring after the issuance of a

[12] *See* United Gas Pipe Line Company v. Federal Power Commission, 385 U.S. 83, 87 S.Ct. 265, 17 L.Ed.2d 181 (1966)

certificate cannot be used to invalidate the certificate, unless the Act confers a source of continuing authority to revise and amend that certificate. In *Colorado Interstate Gas Company* v. *Federal Power Commission*, 185 F.2d 357 (3rd Cir. 1950), the court quoted the identical language from the Supreme Court's opinion in *Panhandle Eastern Pipe Line Co., supra*, that we quoted above and then stated:

> Nothing need be added to this clear statement of the coverage of the act. When applied to the problem before us it means that the power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress has conferred upon the Commission that body is without authority to compel Colorado Interstate to make its gas tariff applicable to any sales other than those for resale. It is beyond the power of the Commission to require a natural gas company within its jurisdiction to make its tariff applicable to sales which are not within the regulatory power of the Commission for this would be in effect to regulate such sales.

Yet this is precisely what the Commission has undertaken to do in the situation at bar. Its opinion No. 606 requires United to file a plan for the curtailment of direct sales, including those made to LP&L under these contracts in the form of new and amended tariff sheets. *See also City of Hastings, Nebraska* v. *Federal Power Commission*, 221 F. 2d 31 (D.C. Cir. 1954).

Panhandle Eastern Pipe Line Co. v. *FPC*, 232 F. 2d 467 (3rd Cir. 1956) is not to the contrary. In that case the Federal Power Commission had granted a pipeline company *conditional* certificates and, before the certificates were made final it required the company to

file tariffs which contained interruptible priorities for excess gas. After this requirement was made by FPC, the pipeline company acquired new direct sales customers to absorb its excess gas supply and thereby attempted to circumvent the restriction. The Court refused to allow this negation of the FPC's requirement. This case turned upon the recognized jurisdiction vested in the Commission to consider end use and price factors in determining *initial* permanent certification, and not upon any recognition of a right of continuing certificate jurisdiction. The court distinguished rather than overruling or modifying its prior opinion in *Colorado Interstate Gas Company, supra.*

We also distinguish the 6th Circuit's 1949 decisions denying specific performance in one instance and injunctive relief in another as to disputes between a pipeline company and a purchaser of natural gas for resale. *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 173 F.2d 784, and *Panhandle Eastern Pipe Line Co. v. Michigan Consolidated Gas Co.*, 177 F.2d 942. Authority over the interstate gas sale of a pipeline company and a purchaser for resale which was sought to be court-litigated, was clearly vested in the FPC. That is not the case here.

The Commission contends that the provisions of § 4 (b),[13] which prohibit regulated pipeline companies from granting undue preferences respecting transportation of gas subject to the Act, when coupled with

[13] No natural-gas Company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. 15 USCA 717c(b).

§ 5(a),[14] authorizing FPC elimination of such practices, grant the authority to exercise continuing supervisory authority over all aspects of certificated direct sales transactions. This contention is but another form of the proposition advanced under § 7 which we have dealt with above. Carried as far as the FPC urges, it would bring the agency's transportation authority into irreconcilable conflict with the Act's equally viable express direct sale reservation.

Summarizing, we hold that the FPC has no form of continuing certificate jurisdiction over direct sales to customers of interstate pipeline companies. It has the initial right to issue or veto a certificate of public convenience and necessity and it must give its approval to the abandonment of the use of the certificated facilities, but between the two functions the express exemption of regulatory power over such consumptive sales bars agency intervention.

HAS THE "GREEN SYSTEM" BECOME INTERSTATE? (THE NINE-MILE STATION ISSUE):

There is no dispute in the record as to any fact bearing on this point.

All of the gas moving to the Nine-Mile Point Generating Station is delivered through the Green pipeline system, which is located entirely within the State of Louisiana. All gas consumed at the station is produced in Louisiana. During 1970 United chose to fulfill 2.6% of its contract commitment with gas which was flowed a portion of its way from certain

[14] "Whenever the Commission . . . shall find . . . that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." (15 USCA 717d(a).)

Louisiana wells to a valve connection to the Green system, through United's Black (interstate) pipeline system. It is particularly significant that this minor amount of interstate gas had been introduced *into* the Green system, and that no intrastate gas could flow *from* the Green system into the Black system because of the pressure differential between the systems. Although a physical connection permits the Black to Green flow, the two systems are otherwise entirely separate facilities. Approximately 4,000,000 Mcf units of gas were added to the Green system from the Black system in 1970 out of a total of more than 155,000,000 Mcf units which were delivered by the Green system that year. Through an affiliate, United controlled gas wells in Louisiana (which wells were equipped to deliver fuel to both the Black and Green systems, but in fact delivered only to the Black system) that produced more than the entire amount of gas diverted from the Black system into the Green system in 1970.

United and the FPC rely upon this circuit's holding in *Louisiana Public Service Commission* v. *FPC*, 359 F.2d 525 (5th Cir. 1966), commonly called the Florida Parishes case to show the Green system must now be certificated. LP&L argues that since United had within its control the power to meet its obligations to Green system customers using only intrastate gas, the fact that it chose at times to co-mingle a small amount of otherwise intrastate gas with interstate gas and then redeliver it to the Green system, distinguishes the Florida Parishes situation and gives United no basis for seeking to transfer the Green system from Louisiana to federal control.

In determining whether a particular gas delivery system is subject to federal regulation neither contract stipulations nor other conventions or legal fic-

tions control. The court must examine "the anatomy of the pipeline system to discover the channel of constant flow" to see if, in fact, gas crosses a state line at any stage of its movement from wellhead to ultimate consumption. If it does, it is interstate gas. *People of the State of Calif.* v. *La Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486, 13 L.Ed.2d 357 (1965); *FPC* v. *Amarada-Petroleum Corp.*, 379 U.S. 687, 85 S.Ct. 632, 13 L.Ed.2d 505, *reh. denied* 380 U.S. 959, 989, 85 S.Ct. 1084, 1327, 13 L.Ed.2d 976, 14 L.Ed2d 283 (1965).

The lower court held that this analysis of constant flow required agency expertise and that it should refuse to exercise its jurisdiction and require exhaustion of administrative remedies. Without adopting any sweeping or dogmatic contrary rule for every imaginable case, we disagree in the case at bar. The solution to the legal problem here depends upon simple flow mechanics, which are demonstrated in this record by uncontradicted evidence. It requires no expertise to determine that the channel of constant flow, insofar as the gas passed through and consumed from the Green system is concerned, is essentially within the State of Louisiana. There is no attempt here to clothe interstate gas with an intrastate or non-jurisdictional sale character by contract language as was present in the *La Vaca* and *Amarada* cases, *supra*. The intrastate character of this sale is based on substance—the physical movement of gas—not on any formalism or technicality.

The Florida Parishes case is equally factually distinguishable. There, gas from Louisiana wells was collected and delivered into large high-pressure gas transmissions mains which transported substantial volumes of gas in interstate commerce to points in Mississippi and Alabama. Lateral connections from these main pipelines were used to serve towns in Louisiana. The court described the lines as "part of

a fully integrated system by means of which United transports and sells gas from the states of Texas, Louisiana and Mississippi to industrial customers, pipelines and local distributors in those states and in Alabama and Florida." An analysis of the anatomy of constant flow in the single system which served those towns demonstrated that gas had to move through interstate facilities to reach them. They did not receive their gas through a distinct and geographically localized system such as the Green system here.[11] The *Amarada* case also is physically distinct. Although more of the gas which the contracts there attempted to classify as intrastate actually flowed in interstate commerce in the summer months, a substantial volume flowed in the winter months also. Thus, analysis showed a constancy of interstate movement. The *Lo-Vaca* case presented an attempt to contractually formulize two gas sales which moved through an interstate pipeline as direct sales and therefore exempt from regulation. The Court disregarded the contract language and looked to see, not only that these sales were only a portion of the volume of interstate gas moving in a single system, but also that a portion of this gas was in fact resold outside of the state where it was produced.

In contra-distinction to each of these cases, the flow of gas from the Black system into the Green system in the case at bar is occasional and irregular, as well as minimal. The Green system, as an entire and separate unit, is physically located in and functions entirely in Louisiana. Therefore, the undisputed facts show that the channel of constant flow is an intrastate and not an interstate channel. The regulation of the

[11] In fact, our Florida Parishes opinion was careful to point out: "the question under consideration has no relation to United's purely intrastate pipeline facilities which are completely separate from its interstate system and over which the commission has not asserted jurisdiction."

Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction."[18]

DO FPC PROCEEDINGS BAR COURT RELIEF?

Both United and the FPC contend that the curtailment proceedings in Docket No. RP 71-29 and the certificate proceedings in Docket No. CP 71-89 are within the jurisdiction of the FPC and that the court was correct in dismissing the present action. All parties cite numerous precedents, most from the Supreme Court. An attempt at rationalization would needlessly lengthen this opinion. The entire area has been thoroughly analyzed by a leading text in the field. It collects and discusses most of the authorities relied on by both sides. It was relied upon by the court below and we rely upon it here. *See* 3 K. Davis, Administrative Law Treatise §§ 20.01 through 20.03.

Because we hold the lower court erred in its holding regarding potential injury and in its views as to primacy of agency jurisdiction, we arrive at a different result in applying Professor Davis' three-part test (§ 20.03).

See Bailey v. United States, — F.2d — (5th Cir. 1971) [No. 71-1731, December 8, 1971], and *cf. United States v. Hernandez*, — F.2d — (5th Cir. 1971) [No. 71-1656, December 27, 1971].

IS THIS APPEAL MOOT?

United also urges that the rendition of the FPC's opinion No. 606 has rendered the present action moot.

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[18] P&L has urged that the clearly erroneous review standard of Fed.R.Civ.P. 52(b) must be applied here. We note, however, our ruling does not involve any disagreement with facts found by the district court. We only differ with the interpretation he places on undisputed evidence. Such interpretations are reviewable "free from the restraining impact of the so-called 'clearly erroneous' rule". *See* B & M Company v. United States F. 2d . (5th Cir. 1971) (71-1320 December 1, 1971).

We disagree. That opinion is subject to court review under § 19 of the Act.[17] An appeal has been taken by LP&L to this court from Opinion No. 606 and is now pending as Cause No. 71-3429. Thus, there is an unusual confluence of reviews in this court in the matter *sub judice*. However, until affirmance upon the completion of court review, FPC Opinion No. 606 is not a final determination of the issues presented. It would be a strange, Frankenstein sort of legislative delegation that would empower the agency it creates to declare its own extent. Without at all intimating what weight should ultimately be assigned to the conclusions of Opinion No. 606, we are firm in our conviction that it does not oust the adjudicatory power of a court that has reviewing authority over both the court and the agency proceedings.[18]

CONCLUSION

LP&L had no burden to demonstrate that its allegations of irreparable injury were correct on the preliminary hearing of its opponents' motions to dismiss. The FPC lacked jurisdiction over the previously certificated direct sales to Sterlington, and over the intrastate sales at Nine-Mile Point, therefore declining jurisdiction and requiring exhaustion was error. The order dismissing this cause is reversed and the cause is remanded with directions to expedite the hearing and disposition of this cause on its merits.

REVERSED and REMANDED, *with directions*.

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[17] 15 USCA 717r.

[18] If Opinion No. 606 has any instant effect it may be contrary to United's urgings. In the sense that it is a final agency action, its finality could militate against United's claim that the agency's primary jurisdiction still bars court action. However, without pausing to consider the ramifications of collateral versus direct review rights since both court and agency action are before us now, we express no opinion on this aspect of the matter.

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

October Term, 1971

No. 71-2550

D.C. Docket No. 16637

LOUISIANA POWER & LIGHT COMPANY,
PLAINTIFF-APPELLANT

v.

UNITED GAS PIPE LINE COMPANY, ET AL.,
DEFENDANTS-APPELLEES,

FEDERAL POWER COMMISSION, INTERVENOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

Before THORNBERRY, MORGAN and CLARK, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to expedite the hearing and disposition of this cause on its merits;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

JANUARY 14, 1972.

APPENDIX C

In the United States District Court
for the Western District of Louisiana

MONROE DIVISION

Civil Action No. 16637

LOUISIANA POWER & LIGHT COMPANY

v.

UNITED GAS PIPE LINE COMPANY
AND PENNZOIL UNITED, INC.

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NAUMAN S. SCOTT, *Judge*:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an injunctive proceeding brought by Louisiana Power and Light Company (LPL) aginst defendants United Gas Pipe Line Company (United) and Pennzoil United, Inc. (Pennzoil) to restrain and enjoin the defendants from curtailing the supply of gas to plaintiff's Sterlington and Nine Mile Point generating stations in Louisiana and ordering defendants to deliver natural gas to plaintiff in accordance with the provisions of the current contracts between LPL and United.

LPL is a Florida corporation having its principal place of business in the State of Louisiana and is a "public utility" within the meaning of the Federal Power Act, 16 U.S.C. 791(a) *et seq.* and is the owner and operator of the Sterlington and Nine Mile Point electric generating plants previously mentioned.

Pennzoil and its wholly-owned subsidiary, United, are Delaware corporations having their principal place of business in the State of Texas. United is engaged in the transmission of natural gas through transmission lines located in states including Louisiana, Texas and Mississippi and also delivers to interstate pipe line companies for resale. United has been furnishing natural gas to LPL at both the Nine Mile Point Station and the Sterlington Station under contract for many years.

JURISDICTION

LPL asserts that this Court has jurisdiction under 28 U.S.C. 1332 because this is a civil action in which the matter in controversy exceeds the sum or value of $10,000.00, and is between citizens of different states.

THE ISSUE

Pennzoil, United and the Intervenor, Federal Power Commission (FPC) dispute this Court's jurisdiction and have filed motions to dismiss on the contention that this matter involves a proceeding (curtailment of natural gas) which is presently before the FPC, that LPL is an active participant and a party to these proceedings before the Commission, and that the FPC has exclusive jurisdiction under Sections 4 (b), 5(a), and 15 of the Natural Gas Act [15 U.S.C. 717c), 717(d), and 717(o)].

FINDINGS OF FACT

1. United has supplied gas to LPL's Sterlington Station under contracts which include a provision entitled "Impairment of Deliveries" as follows:

> In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers.

2. United has supplied gas to LPL's Nine Mile Point Station under contracts containing provisions entitled "Impairment of Deliveries" as follows:

> Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers

shall first be supplied by Seller and next the gas requirements of public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers.

3. It is conceded that LPL is an industrial consumer and utilizes the gas delivered to it to generate the electric power at its Sterlington and Nine Mile Point stations and not for the purpose of resale.

4. All gas delivered by United to the Sterlington and Nine Mile Point Stations is produced in Louisiana. All deliveries of gas to the Sterlington Station are intgrstate gas. Deliveries of gas to the Nine Mile Station are made through the "Green" Pipe line which is located entirely within the State of Louisiana. The great bulk of the gas in the "Green" line is intrastate gas. However, some gas is dumped into the "Green" pipe line from the "Black" pipe line. This is interstate gas so there is a co-mingling of intrastate and interstate gas in the "Green" pipe line. An application is presently pending before the Federal Power Commission (RP71-89) to certify the "Green" pipe line.

5. United filed with the FPC on October 26, 1970 a petition for a declaratory order to curtail gas deliveries during the winter months (November 1 to April 1) on a ratable basis and in the following order: (1) gas used for industrial purposes, including gas used to generate electricity which in turn is applied to industrial uses, (2) gas used to generate electricity which is consumed by domestic customers, and (3) gas used by domestic consumers. United alleged that

the curtailment was made necessary because the gas supply was insufficient to meet its contract requirements. Attached to the petition are exhibits including exhibits showing the United customers affected by the proposed curtailment, as follows:

	Number
Jackson Area:	
Industrials	6
Power Plants	4
Pipelines	2
City Gates	1
Mobile-Pensacola Area:	
Industrials	17
Power Plants	2
City Gates	3
Shreveport Area:	
Industrials	5
Power Plant	1
Pipelines	6
City Gates	2
New Orleans Area:	
Industrials	4
Power Plants	3
City Gates	2
Lafayette Area:	
Industrials	2
Power Plants	1

These are the parties (customers) affected by the FPC proceeding RP71–29 who are not parties to this suit.

6. LPL filed its petition to intervene in RP71–29 on November 25, 1970 stating the "impairment of deliveries" articles of its contracts with United. It also stated its proposed curtailment violated these contracts; that the FPC did not have jurisdiction over United's sales to LPL because they constitute "direct sales" which are exempt under Section 1(b) of the Natural Gas Act and requests to participate in the hearing without waiving these objections. (FPC Exhibit 3, Item 5).

7. The FPC approved United's curtailment program for the 1970–71 winter season by order in FPC Docket No. RP71–29 dated December 29, 1970 (FPC

Exhibit 3, Item 7). This order was issued as a result of the settlement between the parties, including LPL.

8. United filed a supplemental petition in RP71–29 on February 22, 1971 for the extension of its curtailment program from April 1, 1971 through October 31, 1971 (FPC Exhibit 3, Item 3). The record does not disclose the number or identity of intervenors, including LPL, who intervened prior to November 25, 1970 in RP71–29, however, an order was issued March 10, 1971 permitting the intervention by Aluminum Company of America, Boise Southern Company, Container Corporation of America, Marquette Cement Manufacturing Company, National Gypsum Company, New Jersey Natural Gas Company, Scott Paper Company, Transcontinental Gas Pipeline Corporation and United Gas, Inc., and on April 12, 1971 an order issued permitting the intervention of the City of Pensacola, Florida, et al., Clarke-Mobile Counties Gas District, General Services Administration, Northern Illinois Gas Company and Mississippi Public Service Commission (FPC Exhibit 3, Items 9 & 10).

9. LPL has not denied United's assertion that its supply of gas is inadequate to meet its present and impending gas delivery commitments. It has, in fact, agreed to the curtailment approved in the order of December 29, referred to in Finding 7 above. The fact that the Natural Gas Transmission Industry has recently experienced a decline in the ratio of crude natural gas reserves to annual volume of consumption caused in part by the increasing demand for natural gas by customers and the declining rate of additions to the natural gas reserves has been judicially noticed by the Fifth Circuit, *Austral Oil Co. v. Federal Pwer Comm'n.*, 428 F.2d 405 (5th Cir.); Cert. denied, 400 U.S.C. 950 (1970) (Southern Louisiana Area Rate Cases).

10. FPC Order No. 431 directed interstate pipe lines, including United, to take steps, including filling storage fields, in order to insure capacities to meet the heating season demands for the winter of 1971–72 (November 1, 1971 to March 31, 1972). The Order further directed the pipe lines to file plans within thirty days indicating the way in which the pipe lines proposed to meet the winter heating season demands. United filed its response on May 17, 1971; the Commission docketed the response under FPC Docket No. RP71–120 and then on May 28, 1971 order Docket No. RP71–120 consolidated for hearing and decision with Docket No. RP71–29. That order provided that persons who are parties to the proceeding in Docket No. RP71–29 will be deemed to be parties in the consolidation and need not file to intervene in Docket No. RP71–120.

11. LPL has alleged (Complaint Paragraph 17) that the proposed curtailment by United could ultimately effect a "black-out" or "brown-out" which, under certain circumstances, could cover an area as large as the whole State of Louisiana or, indeed, a several-state area such as occurred during the notorious "northeast blackout" in 1965. The record is bare of any evidence to support this allegation.[1] In fact, in a registration statement filed by LPL with the Securities and Exchange Commission on February 19, 1971, the following statement was made:

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[1] Mr. J. M. Wyatt, Vice president of LPL, testified as follows when cross-examined by Mr. Gooch, representing the FPC:

"By Mr. Gooch:

Q. All right, sir. Now let's look under such things as litigation and regulations in the registration statement filed by the SEC. Mr. Carter has just said that they were not going to assume they would lose any suits. Would you show me anywhere in this registration statement filed in April, where Mr. Carter even disclosed to the public that there was a suit pend-

"FUEL SUPPLY. The Company's primary fuel is natural gas. Two of the Company's three major generating stations are outfitted to burn oil as a standby fuel, and the third station is presently being modified to allow the burning of oil as a standby fuel and this modification is scheduled for completion by June 1971. The Company has firm contracts for an adequate supply of gas for all generating capacity which is or will be operational prior to 1974 (3404 MW), which contracts have various expiration dates from 1978 to 1993. During the winter of 1970–71 gas was curtailed to some extent by one supplier who supplies gas to approximately 550 MW of generating capability. After June 1971 the Company expects to be able to offset any foreseeable gas curtailment by burning oil. The supply of fuel for generating units that will

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ing which could cause Louisiana Power and Light Company to suffer brown-outs and black-outs if this allegation were true?

A. If I understand your question, I don't see why it would be necessary to notify, because there was nothing involved here, that would cause brown-outs or black-outs on this suit.

Q. Nothing involved in the suit?

A. In the suit that I am looking at here, if I understand your question.

Q. My question is—is the suit that we are here in Court for today, do you see that disclosed anywhere, to the public, that it is pending?

A. No, it is not in here.

Q. All right. Now, would you please look at the date of this certificate?

A. Yes.

Q. Will you tell the Court what this is?

A. May 19, 1971.

Q. Are you aware of the filing with the SEC that would either call to the attention the pendency of this suit to those who may be interested in purchasing Louisiana Power and Light securities or reporting any change in your fuel oil situation subsequent to May 19, 1971?

A. I am not aware of it." (Tr. p. 103).

become operational in 1974 and thereafter is being negotiated at this time." FPC Exhibit 21.

12. On March 31, 1971, LPL, although it was an active participant in the curtailment proceeding before the FPC, filed its complaint in this Court, seeking to enjoin United's curtailment program insofar as it affected LPL's Sterlington and Nine-Mile Point Stations. The trial Court, after considering the pleadings of LPL and the briefs and arguments of its counsel granted a Temporary Restraining Order on April 27, 1971.

13. April 28, 1971, the FPC intervened and filed a Motion to Dismiss for lack of subject matter jurisdiction. United-Pennzoil, on April 29, 1971, filed its Motion to Dismiss.

14. The Court considering the additional pleadings then before it, dissolved the temporary restraining order on April 29, 1971 and dismissed the case for lack of jurisdiction. LPL filed a Notice of Appeal and moved for a stay order which the Court refused. The matter is now before this Court on an Order of the Fifth Circuit Court of Appeals dated May 14, 1971 vacating the trial Court's judgment of dismissal and remanding the case to the District Court for an expedited hearing on the jurisdictional issue and such other preliminary issues as might be properly raised.

15. The original trial judge having recused himself, the matter was assigned to this Court for hearing and a full evidentiary hearing was conducted on May 27, 1971.

CONCLUSIONS OF LAW

LPL seeks an injunction restraining and enjoining United and Pennzoil from curtailing the supply of gas to the Sterlington and Nine Mile Point generating stations of LPL in breach of United's contracts with LPL, and ordering said companies to deliver

natural gas to LPL in accordance with the provisions of said contracts.

LPL is not entitled to injunctive relief unless it clearly establishes that it is threatened with irreparable injury. It alleges that its Sterlington Station has no alternative source of energy (Complaint Paragraph 17) and that the implementation of the curtailment might result in an extensive "Brown-out" or "Black-out" (Complaint Paragraph 16). LPL has failed to establish irreparable injury (Findings of Fact No. 11) and therefore is not entitled to injunctive relief. However, the Court does not choose to rest judgment solely on these grounds, since the Court of Appeals has directed that a specific finding should be made on the jurisdictional issue.

LPL forcefully contends that this Court has primary jurisdiction and that the FPC lacks jurisdiction because (1) the gas delivered to the Nine Mile Point Station is "intrastate gas" not subject to the jurisdiction of the FPC and (2) direct sales such as the sales from United to LPL are exempt from the jurisdiction of the Commission under the provisions of Section 1(b) of the Natural Gas Act (15 U.S.C. 717).

It is not clearly established by the record that the gas delivered to the Nine Mile Point Station is "intrastate gas", since some "interstate gas" is dumped into the system which supplies the Nine Mile Point Station (Findings of Fact No. 4). The determination of this question is within the fundamental jurisdiction of the FPC, requires the expertise of that agency and is presently pending before that agency in Docket No. RP71–89. The same problems were properly disposed of in the Florida Parishes cases; In the Matter of United Gas Pipe Line Company, Docket No. CP62–161, 30 FPC 560, affirmed on appeal, sub nom., *Louisiana Public Service Commission et al. v. Federal*

Power Commission et al., 359 F. 2d 525, cert. denied, 385 U.S. 833, 17 L. Ed. 68, 87 S. Ct. 73.

LPL's second contention is predicated on a finding that the question at issue is the violation of provisions of its direct sales contract with United. However, United's application to the FPC in RP71–29 is couched in terms of a curtailment proceeding (FPC Exhibit 3, Item 1). The exhibits and testimony pertain to volumes of gas—supply and delivery. It seems fairly obvious that if the Court required delivery of the full gas contract commitment to LPL, the gas supply available to United's other customers would be reduced and the curtailment of gas supply to other customers would be proportionately affected. Thus all of United's customers have an interest, including more than 50 intervenors in RP71–29. A cursory examination of the testimony and the exhibits produced at the hearing before this Court on May 27 will demonstrate the complexities and the technical nature of the matters involved in United's application and the special expertise required to resolve it. This is a curtailment proceeding. The proposed curtailment program certainly affects deliveries to United's customers under direct sales contracts such as LPL. However, this is a collateral effect of the curtailment and does not necessarily convert it into an attempt by the FPC to exert jurisdiction over such direct sales contracts.

The threatened irreparable injury alleged by LPL (possible "brown-out" or "black-out") is related solely to the volume of gas delivered. There is no proof that LPL actually requires its full contract commitment of gas to avoid this consequence. It received less than contract commitments during the winter months of 1970–71 without experiencing such injury. This Court cannot assume, especially in an injunction proceeding, that the full contract commitment of gas

is required by LPL to avoid its alleged injury. The injunction could not be granted if standby fuel, as alleged by defendants, is available. The contracts are strictly collateral to the issue before the Court.

United, Pennzoil and the FPC urge that LPL is not entitled to judicial relief until it has exhausted its administrative remedies in the FPC. The Courts have not uniformly followed this precept. Professor Davis, in his *Administrative Law Treatise,* Volume 3, Section 20.03, Page 69, suggests factors which should be considered in determining whether this precept should be followed:

> "The key factors are three: extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction. Unfortunately, each of these three key factors is a variable, and each often calls for a considerable amount of judgment for its proper appraisal.
>
> A workable standard probably should not go beyond a statement that each of these three factors should be weighed in determining whether or not a court should decide an issue of administrative jurisdiction without requiring exhaustion of administrative remedies. A neat word formula probably is not feasible."

As noted above, LPL has made no attempt to establish the minimum volume of gas which is required to maintain its service, or that the amount allocated to it under the curtailment program is insufficient to meet its minimum requirements. The contracts are hardly pertinent to these issues. The Court finds that LPL has not proved the extent of possible injury which might result from pursuit of the administrative remedy, that the curtailment proceedings are well within the jurisdiction of the FPC and that the

expertise of the FPC is necessary for the proper consideration and disposition of the issues presented in this proceeding. LPL must exhaust its administrative remedies despite its assertion that the FPC lacks jurisdiction. *Myers* v. *Bethlehem Steel Corp.*, 303 U.S. 41, 82 L.Ed 638, 58 S.Ct. 459; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 90 L.Ed. 839, 66 S.Ct. 712; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, 91 L.Ed. 1261, 67 S.Ct. 962, rev'g 156 F.2d 821; *Union Oil Co. of California* v. *Federal Power Commission*, 236 F.2d 816 (5th Cir. 1956), Cert. denied, 352 U.S. 696, 1 L.Ed. 323, 77 S.Ct. 360; and *Lone Star Cement Corp.* v. *Federal Trade Commission*, 339 F.2d 505. The FPC is competent to decide its jurisdiction and should do so. *City of Hastings, Nebraska* v. *Federal Power Commission*, C.A.D.C. 221 F.2d 31; *Marine Engineers* v. *Interlake S.S. Co.*, 370 U.S. 173, 8 L.Ed.2d 418, 82 S.Ct. 1237.

The motions of United, Pennzoil and the FPC to dissolve the temporary restraining order and to dismiss this suit are granted and the temporary restraining order heretofore issued on April 27, 1971, is dissolved.

Counsel for defendants United and Pennzoil and for Intervenor FPC immediately shall prepare a proper decree and obtain approval thereof from counsel for plaintiff LPL in accordance with Rule 9 of this Court and present such judgment for signature as expeditiously as possible.

THUS DONE AND SIGNED at Alexandria, Louisiana, this 25th day of June, 1971.

NAUMAN S. SCOTT,
United States District Judge.

APPENDIX D

In the United States Court of Appeals for the Fifth Circuit

No. 71-1773

LOUISIANA POWER & LIGHT COMPANY, PETITIONER-PLAINTIFF

v.

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., RESPONDENT

(*Filed May 14, 1971*)

ORDER

Before WISDOM, COLEMAN, and SIMPSON, *Circuit Judges.*

BY THE COURT: This matter arises out of the complaint of the Louisiana Power & Light Company (LPL) against United Gas Pipe Line Company (United) a wholly-owned subsidiary of Pennzoil United Inc., alleging that United breached its contract with LPL for the supply of natural gas to LPL's electrical generating plants at Sterlington and Nine Mile Point in Louisiana. The Federal Power Commission intervened. On April 27, 1971, the district court, having considered only the complaint and brief of LPL, granted a temporary restraining order prohibit-

ing United from violating its contract curtailing its supply of gas to LPL. The order set a hearing on the preliminary injunction for May 11, 1971. United and the Federal Power Commission thereupon moved to dissolve the temporary restraining order and to dismiss the complaint for the following reasons:

> "(1) The complaint fails to state a claim upon which relief can be granted.
>
> (2) The Court lacks jurisdiction over the subject matter, exclusive jurisdiction being vested in the Federal Power Commission under and by virtue of the Natural Gas Act (15 USCA § 717 et seq.).
>
> (3) Because this is a collateral attack upon proceedings now in progress before the Federal Power Commission, to which proceedings Plaintiff is a party, and Plaintiff has failed to exhaust its administrative remedies under the Natural Gas Act."

On April 29, 1971, the district court, without a hearing but after having received briefs from the parties and the intervenor, granted leave to the Federal Power Commission to intervene, dissolved the temporary restraining order, and dismissed the suit for lack of jurisdiction. LPL filed a notice of appeal.

On Saturday morning, May 1, 1971, LPL moved for leave to file writs of mandamus and certiorari and, alternatively, for an expedited appeal. LPL also moved for an injunction pending appeal. These matters were presented ex parte to a single judge (Wisdom, *J.*). In the interest of judiciary economy, he treated these motions as one matter, as this panel does, calling for a stay of the district court's order dismissing the complaint and dissolving the temporary restraining order. Shortly after noon on Saturday, Judge Wisdom declined to pass upon the merits of the

motions but issued a stay, subject to further orders of this Court, until a panel could be convened and conduct a hearing on the merits of LPL's motions. See Rule 8(a) of the Federal Rules of Appellate Procedure and Rule 10(b)(11), Local Rules of the United States Court of Appeals for the Fifth Circuit.

On May 5, 1971, a panel of this Court, consisting of the undersigned judges, conducted a hearing at which counsel for the Federal Power Commission, United, and LPL were present and given an opportunity to argue the case at length. The Court has now had an opportunity to consider the briefs, affidavits, and other papers presented at that hearing and subsequent to the hearing.

We note, first, taking an over-simplified view of the case, that the district court had before it as the basis for its decision only the original and amended complaints, the allegations of which must be accepted as true for purposes of a motion to dismiss. According to these allegations, the contract simply involved the direct sale of gas for use or consumption by the purchaser. And such sales are not within the jurisdiction of the Federal Power Commission. The construction of the contract therefore was for the court and United's curtailment of gas deliveries to LPL's plants was a breach of contract, a question within the district court's jurisdiction.

The case, however, is not that simple. It is evident to the Court that there are many disputed issues of fact and mixed issues of fact and law bearing upon a proper interpretation of the contract and a proper construction of the Natural Gas Act, 15 U.S.C. § 717, et seq. Indeed, counsel for the parties argue as if this Court had before it a transcript of testimony, and the district court's findings of fact and conclusions of law. We have concluded therefore that this is the type of

case that requires the district court to take jurisdiction for the purpose of determining if it has jurisdiction. With this end in view the district court is directed to hold a full hearing at which the parties may present evidence bearing upon the jurisdictional issue.

The case is important. LPL contends that curtailment of gas deliveries will have a serious detrimental effect on its customers during its peak season, the summer months. United contends that this is a fight about who gets natural gas when there is not enough to go around; that is a matter peculiarly within the province of the Federal Power Commission. The Commission agrees with United and asserts that an adverse decision in this case will have a severe and detrimental impact upon the natural gas industry and the public which it serves. At this time the Commission is conducting curtailment proceedings to which the LPL is a party.

IT IS THEREFORE ORDERED:

1. Judge Wisdom's order vacating the district court's judgment of dismissal is reaffirmed as the order of this Court.

2. The case is remanded to the district court for an expedited hearing on the jurisdictional issue and on such other preliminary issues as may properly be raised. This Court expresses no opinion on the jurisdictional issue. At such hearing counsel for the parties and the intervenor may present evidence bearing on the jurisdiction of the court and on other appropriate preliminary questions. The district court will make appropriate findings of fact and state its conclusions of law.

3. Should the district court decide that it has jurisdiction, it will expedite the hearing on the merits. An appeal, if any, will be expedited.

4. This Court continues the stay issued by Judge Wisdom pending the hearing and judgment of the district court.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

ABANDONMENT — CERTIFICATES — DIRECT-SALE CONTRACTS — DECLARATORY ORDER — EMERGENCY — GAS SUPPLY — JURISDICTION — PUBLIC INTEREST — SERVICE — TARIFFS — TRANSPORTATION IN INTERSTATE COMMERCE

Before Commissioners: JOHN N. NASSIKAS, *Chairman;* ALBERT B. BROOKE, JR., and PINKNEY WALKER.

UNITED GAS PIPE LINE COMPANY

(Docket Nos. RP71-29, RP71-120, RP71-99)

Opinion No. 606

OPINION AND DECLARATORY ORDER FINDING JURISDICTION, REMANDING SOME ISSUES TO EXAMINER, DISMISSING MOTION TO SEVER, DENYING AND DISMISSING MOTIONS TO ENLARGE SUSPENSION PERIOD, AND DISMISSING PETITION FOR DECLARATORY ORDER TO INTERPRET CONTRACT TERMS.

(Issued October 5, 1971)

PER CURIAM:

HISTORY OF PROCEEDINGS

This proceeding was commenced by the filing on October 26, 1970, of a petition in Docket No. RP71-29 by United Gas Pipe Line Company (United) re-

questing a declaratory order from this Commission finding the curtailment plan to be implemented by United in the event of impaired deliveries was consistent and in keeping with Section 12 of the General Terms and Conditions of United's FPC Gas Tariff, First Revised Volume No. 1.[1] United projected a shortage of gas supplies during the 1970–1971 heating season and possibly thereafter which would not be adequate to meet the contract demands of all of its customers. Its curtailment program initially designated three usage categories (later amended to five categories) for purposes of priority of service or its converse, curtailment. These were, in order of the lowest priority and curtailed first—gas used for industrial purposes, including gas to generate electricity for later industrial use; the second lowest category—gas used to generate electricity consumed by domestic customers; and the highest order of priority—gas used by domestic customers.

Motions and answers were filed objecting to United's petition and asking that we decline to render a declaratory order or that we deny United's petition.[2] The Commission recognized the urgency of the

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[1] These provisions are found in United's filed tariff as Original Sheet No. 71 issued on December 1, 1954, effective August 1, 1954, and First Revised Sheet No. 72 issued on October 31, 1969, effective December 16, 1969. United amended its petition on November 20, 1970, requesting the Commission to order Mobile Gas Service Corp. to cease circumventing United's curtailment plan by reselling its allocated volumes to other customers of United.

[2] Mobile Gas Service Corporation (Mobile) filed a motion on November 10, 1970; Texas Eastern Transmission Corporation (Texas Eastern) filed an answer to United's filing on November 23, 1970; Stauffer Chemical Company (Stauffer) protested United's petition on November 25, 1970, and requested that the Commission reallocate gas deliveries under a more constructive and reasonable plan.

questions presented because the heating season had already begun and because United had placed its curtailment program into effect on November 1, 1970, as it was obligated to do. On December 10, 1970, we ordered hearings to commence on December 21, 1970, and the purpose of the hearings was:

> * * * to resolve the questions presented in United's petition, its amendment thereto and the motions, answers, and protests which those two documents filed by United have engendered, and to determine (a) the proper interpretation of Section 12 of the General Terms and Conditions of United's FPC Gas Tariff and whether the curtailment program placed into effect by United on November 1, 1970, is in accordance therewith, (b) whether it would constitute undue discrimination under the provisions of the Natural Gas Act if a curtailment program placed into effect on United's system did not apply equally to the jurisdictional and direct sales customers of United and (c) whether it would be appropriate for the Commission at this time to consider the question of reallocation of United's total gas supply among all of United customers, and if so, on what basis should such reallocation be made * * *.

United thereafter proposed an interim settlement which was accepted by all parties except Monsanto Chemical Corporation. The Commission approved the settlement on December 29, 1970.[3] In light of the emergency situation which confronted United, we approved the interim curtailment plan to remove uncertainty of operation on United's system during the winter heating season which was then in progress. This settlement tended to meet the objections of the interveners,

[3] The Commission denied Monsanto's petition for rehearing of the settlement approval on February 26, 1971. Monsanto's appeal to the United States Court of Appeals for the District of Columbia is pending in Docket No. 71-1306.

provided for cooperation in the curtailment program through March 31, 1971; and provided that United would attempt to make spot purchases of gas, if possible. It also resolved temporarily the dispute between United and Mobile, the subject of United's November 10, 1971, amendment to its petition. All legal issues were reserved to be determined at a later date; interveners did not admit the curtailment plan was either authorized or required. They agreed not to seek injunction or damages for curtailments through that period but did not waive the right to seek recovery of capital costs for alternative fuel facilities incurred prior to March 31, 1971. Hearings were recessed on December 22, 1970, and, with agreement of all parties, hearings, did not reconvene until March 31, 1971.

Since that order of December 10, 1970, which set the proceedings for hearing, the 1970–1971 heating season has passed, and United filed, on February 22, 1971, a supplemental petition for declaratory order in Docket No. RP71–29 to provide for curtailments beginning April 1, 1971, for the 7-month summer season. This supplemental petition requested sanction of an extension of United's curtailment program from April 1, 1971, to at least through October 31, 1971, and altered the method of calculating curtailments to meet the system's summer needs. United amended its February 22, 1971, supplemental petition on June 14, 1971, to correct errors in the initially filed summer curtailment program. On March 10, 1971, United filed a Second Revised Sheet No. 72 to become effective June 2, 1971. This sheet was, among other things, intended to clarify the intent of Section 12.1 of United's tariff. Our order of May 18, 1971, suspended these revisions

until June 22, 1971, and consolidated that clarification herein.[4]

United filed proposed tariff revisions in Docket No. RP71–120 to become effective on November 1, 1971, to cover curtailments for the 1971–1972 winter heating season and for an indeterminate period thereafter.[5] This recent filing revises the impairment of deliveries provisions in Section 12 of the General Terms and Conditions portion of United's tariff by adding two new categories of curtailment priorities. It also provides that no payments or credits for substitute fuels will be made or given by United in the event of curtailment, and prohibits resale customers from offsetting the effects of United's curtailments by purchasing valley gas available from another customer of United.

All parties rested on July 27, 1971, after 43 days of hearings; initial briefs were filed August 27, 1971, and reply briefs were submitted September 20, 1971. On August 23, 1971, this Commission granted a motion for omission of the intermediate decision to prevent delay in resolving the important questions raised by United and intervenes in these proceedings. It is important that we now determine, before the next winter heating period commences, the initial and crucial question in this proceeding, whether this Commission has

[4] The addition of a new Section 12.3 to United's General Terms and Conditions to eliminate United's obligation to reduce a buyer's demand charge by virtue of proration was at that time consolidated for hearing in another proceeding, Docket No. RP71–41.

[5] United filed those sheets on May 17, 1971, pursuant to our Order No. 431, in Docket No. R–418. They are designated First Revised Sheet No. 71, Third Revised Sheet No. 72 and a new sheet, Original Sheet No. 72–A. This filing was designated as Docket No. RP71–120 and in part consolidated herein and suspended for one day to November 2, 1971, by a May 28, 1971, order in these proceedings.

the authority to accept and approve tariff filings for curtailment plans affecting both sales for resale and direct sales when that curtailment plan is necessitated by the public interest. We now find and conclude in the affirmative.

Other issues to be determined by these hearings, as set forth in our December 10, 1970, order, such as those relating to the implementation of United's curtailment plan pursuant to Section 12 of United's tariff, and relating to whether the Commission should consider reallocation of United's total gas supply, together with any other unresolved questions raised by United's petitions and the answers thereto, we shall remand to the Presiding Examiner for his recommended decision thereon.

A word is in order about another pending United proceeding in Docket No. CP71-89. There United filed an application on October 1, 1970, requesting a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act to continue operating certain facilities and to continue service heretofore treated as local and intrastate in character. These facilities are known as the New Orleans Division of United's system. A central question in that proceeding is whether those facilities are interstate in character and subject to our jurisdiction. To the extent, if any, they are found to be so, our ruling in this proceeding concerning the Commission's jurisdiction over curtailment programs will apply to volumes transported through those facilities.

JURISDICTION AND CURTAILMENTS

Several parties assert that the Commission has no jurisdiction to allocate gas in curtailment proceedings in a manner inconsistent with existing direct sale contracts. It follows from this argument, that if the

gas supply is insufficient to meet the contracted requirements of all consumers, then the direct industrial users might get their gas first, leaving only the remainder to the resale consumers—made up of households, hospitals, schools, public buildings, and industrial and commercial establishments in all states served by the jurisdictional pipelines.

We find herein, based upon the Natural Gas Act and the precedents thereunder, that this Commission has the plenary authority to allocate the gas supply of jurisdictional pipelines to all customers, including direct industrial users, regardless of any contracts with individual customers, direct or resale.

A review of the record in these proceedings constrains us to render a declatory order pursuant to United's petition filed October 26, 1970, as amended. Present here are two principal criteria guiding the policy in favor of rendering a declaratory judgment: a judgment will serve a useful purpose in clarifying and settling legal relations and issues and will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942, 944 (CA6, 1949).

At the outset we note that direct industrial sales cannot be made without a certificate from this Commission and that the Commission must determine whether the public convenience and necessity is met in light of the proposed terms of that sale.[6] In addition, the Commission, pursuant to Section 7(b), must determine whether a direct sale—or any sale—should be abandoned because of depleted gas supply or because it no longer meets the public convenience or necessity. The price at which the direct industrial

[6] *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467, 471 (CA3, 1956).

sale is made is thus material in both certificate and abandonment proceedings. Short of considering rates as a factor in all certification or abandonment proceedings, the Commission does not assert jurisdiction to determine the rates at which direct sales to industrial customers will be made, but it does not follow that we have no jurisdiction over the transportation and deliveries to direct customers for the following reasons.

Our jurisdiction to oversee the implementation of curtailment plans derives, *inter alia,* from Sections 1(b) and 4 of the Natural Gas Act. Section 1(b) states that "The provisions of this act shall apply to the transportation of natural gas in interstate commerce * * *."[7] Several parties claim that language within Section 1(b) limits our jurisdiction here, "* * * this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale * * * but shall not apply to any other transportation or sale * * *." This is urged as indicating that our jurisdiction does not extend to the sales of gas for direct use and thus, *a fortiori,* does not extend to curtailments of gas sold for direct use. We agree Section 1(b) limits our jurisdiction over the rate at which direct sales are made, *F.P.C.* v. *East Ohio Gas Co.,* 338 U.S. 464 (1950); *City of Hastings, Nebraska* v. *F.P.C.,* 221 F.2d 31, 39 (CADC, 1954), *cert. denied,* 349 U.S. 920 (1955), but in exercising our certificate jurisdiction or jurisdiction over the abandonment of direct sales, we must and do consider the rates at which direct sales are made. However, Section 1(b) also provides us with jurisdiction over the transportation of gas in interstate commerce, and there lies our power and duty to act at this time of curtailments. Any transportation by a jurisdictional pipeline is in interstate

[7] 52 Stat. 821 (1938), 15 U.S.C. Sec. 717(b).

commerce, including the transportation and sale of gas to a direct industrial user. *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467 (CA3, 1956), *cert. denied*, 352 U.S. 891 (1956).

Panhandle Eastern Pipe Line Co. v. *Public Service Commission of Indiana*, 332 U.S. 507, 516–517 (1947), is cited by some parties for the proposition that Congress did not intend this Commission to regulate direct sales for consumptive use. But the case in no uncertain terms stands for the opposite conclusion. There Panhandle challenged the Public Service Commission's authority to require the filing of information to regulate direct sales. To support its position, it argued that state regulation of direct sales would result in a conflict among states on the issue of curtailments during periods of gas shortage. The United States Supreme Court affirmed a ruling upholding the Indiana Commission's authority to regulate certain aspects of direct sale; but in affirming, the Supreme Court recognized its holding was not the broad stroke delimiting all forms of Federal regulations concerning direct sales that those opposing our exercise of jurisdiction now argue. There the court merely found, "* * * the states are not made powerless to regulate the sales in question by any supposed necessity for uniform national regulation * * *." (332 U.S. at 523–4). In so finding it did not find conversely that this Commission is powerless in the area.[8] The Court specifically recognized this Commission's authority to act on a national level in instances relating to direct sale curtailments (332 U.S. 523):

> Appellant also envisages conflicting regulations by the commissions of the various states * * * particularly in relation to *curtailment of service* * * * if such conflicts should

[8] *Cf. F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 473–4 (1950).

> develop, the matter of interrupting service is one largely related, as appellees say, to *transportation* and thus within the jurisdiction of the Federal Power Commission to control in accommodation of any conflicting interests among various states. [Footnote omitted; emphasis supplied.]

Curtailments thus do not relate to rates, they relate to transportation wherein our jurisdiction here lies. "And throughout the Act 'transportation' and 'sale' are viewed as separate subjects of regulation." *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950).[9] In *South Georgia Natural Gas Co.*, 23 FPC 795 (1960), we said, "Section 1(b) of the Act * * * states that the Commission shall have jurisdiction over the 'transportation' of gas for direct sales, but not over the direct 'sales' themselves." 23 FPC at 796. Thus, while we generally do not assert jurisdiction to determine the *rates* at which direct sales are made (except in certificate or abandonment proceedings), we possess authority to regulate the *volumes* of gas transported for direct sale.[10]

It is argued that lack of rate jurisdiction over direct sales precludes our exercising jurisdiction over tariff provisions affecting direct sales. Among the cases cited for this argument is *Colorado Interstate Gas Co.* v. *F.P.C.*, 185 F.2d 357 (CA3, 1950). Unlike the situation in *Colorado*, the curtailment plans, as set out in this order, do not directly apply to rates and charges. Moreover, the court in *Colorado* relied upon *Panhandle Pipe Line Co.* v. *Public Service*

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[9] For further cases on this point see *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 359 F.2d 675, 682–3 (CA8, 1966).

[10] See *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947). *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467, 471–2 (CA3, 1956, *cert. denied*, 352 U.S. 891 (1956).

Commission of Indiana, supra, for its holding but, as noted above, the Supreme Court in *Panhandle* specifically said that the exceptional situation created by curtailments would vest authority in this Commission to act. Also on this point, the holding in *Granite City Steel Co.* v. *F.P.C.*, 320 F.2d 711 (CADC, 1963) is not relevant and material to the question of our *jurisdiction* to approve and authorize curtailment plans because it concerned, instead, only the question of reallocating volumes to provide gas for new customers pursuant to Section 7(a) of the Act.

This jurisdiction over the transportation of gas in interstate commerce is and must be of a continuing nature, otherwise our jurisdiction over the direct connection in the first instance would be insignificant, *South Georgia Natural Gas Co.*, 23 FPC at 796. Nor does this continuing jurisdiction apply only to Section 7 issues alone, for it is axiomatic that whenever our jurisdiction applies in the first instance pursuant to Section 1(b) of the Act, each of the Act's other provisions may be utilized to carry out the regulatory purposes of Congress for which jurisdiction was to initially attach; except, and only except, to the extent limited by Section 1(b) of the Act. The general object and purposes for which the Act was passed includes the desire to eliminate and prevent unfair, unreasonable or discriminatory service to the gas consuming public. This cannot be accomplished without full authority to rule upon a curtailment plan; a matter toward which our authority over the transportation of gas for resale or direct sale must be aimed. Our transportation jurisdiction does not relate solely to arrangements whereby gas is transported for another pursuant to a transportation agreement but it relates also to the transportation of gas for direct

sale by the pipeline, *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950); *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467, 471–2 (CA3, 1956), *cert. denied*, 352 U.S. 891 (1956).

Curtailment situations are not new. Shortly after World War II, gas was not available in quantities equal to the demands of firm customers. Questions concerning supply allocation arose between Panhandle Eastern Pipe Line Company and its customers. This Commission took an active part in assuring fair application of gas allocations. We required Panhandle to file "proposed rules and regulations to govern curtailment and interruption of gas service." Following hearings on the proposals filed, and voluntary agreement, emergency rules for curtailment became embodied in Panhandle's rate schedules. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 5 FPC 983 (1946). These rules affected direct customers of Panhandle as well as wholesale customers."

The outcome of the litigated cases that followed Panhandle's curtailment left no doubt that our authority extends to allocating or approving the allocation of volumes of gas during gas shortage situations. We ruled on precisely this issue with respect to contracts filed pursuant to Section 4 of the Act in *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196, 203–4 (1947). In *Michigan Consolidated Gas Co.* v. *F.P.C.*, 203 F.2d 895, 900 (CA3, 1953) the court said, "The problem of the allocation of service to various customers is one which calls for judgment within the Commission's peculiar and expert competence." In another case, *Michigan Con-*

[11] The following year voluntary agreements could not be reached but similar rules for curtailments were again issued, *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196 (1947).

solidated Gas Co. v. *Panhandle Eastern Pipe Line Co.* 226 F. 2d 60 (CA6, 1955), *cert. denied* 350 U.S. 987 (1956), the court affirming a lower court's refusal to assume jurisdiction of a claim for damages under a gas contract breached, of necessity, due to a gas shortage, said (226 F. 2d at 70):

> * * * The problems * * * involved * * * "intricate problems of service as between different users and different geographical sections" and required for their decision the technical understanding and expert knowledge of the Commission. The transactions * * * relevant involve eight states and great metropolitan areas. The problems of changing industrial conditions and growing needs for natural gas both territorially and otherwise are so extensive they do not lend themselves in the first instance to hearing before a court and require the expertise of the Commission.

Similarly, in *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 789 (CA6, 1949) the court said, "* * * the operation of existing facilities in such manner as is sought may * * * result in changes of service to other customers without undue preference or undue discrimination within the power of the Commission to control * * *."

This latter language pinpoints the need for our authority to act here. A system-wide gas shortage reduces volumes transported and necessarily causes a change in the operation of existing facilities that serve customers in several states in several regions; each with unique climatic, geographic and economic characteristics, and can affect service to homes, schools, hospitals, and other institutions. Without our exercising plenary jurisdiction over all phases of curtailment, any of the pipeline customers might be the object of undue discrimination stemming from

some customers taking deliveries of gas for direct industrial consumption in one state in such quantities as to impair deliveries to cities and towns in the same or other states, with uncontrolled disruption resulting therefrom.

Our continuing control over the transportation of all gas transported or sold, whether for resale or direct sale for consumption, to carry out the basic intent of the Act, insofar as we are not specifically precluded by Section 1(b), runs in part to preventing the type of discriminatory practices set forth in Sections 4(b) and 5(a) of the Natural Gas Act.[12]

Those sections of the Act cover a broader range than simply the regulation of rates or charges. While that portion of section 4(b) of the Act prohibiting "undue preference or advantage * * * or * * * undue prejudice or disadvantage" or that portion which does not permit any pipeline to "maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect * * *", may be applied to prevent the evasion of "just and reasonable rates," they may be applied equally to prevent discrimination in "service," which in curtailment cases, as here, may not be quantifiable into rates. In such instances, our regulatory power granted in Sections 4(b) and 5(a) of the Act would be unduly restricted were we unable to oversee all curtailments affecting service. The Supreme Court has specifically pointed to that language within Section 5(a) of the Act relating to the Commission's authority to correct "unjust, unreasonable, unduly discriminatory, or preferential" activities or contracts and said, "It is clear that contracts covering direct industrial sales come within that * * * clause of Section 5(a)." *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635, 647 (1945).

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[12] 52 Stat. 822, 823, (1938), 15 U.S.C. Secs. 717c, 717.

Thus, it is our duty to determine whether the practices forbidden in Section 4(b) or 5(a) of the Natural Gas Act in fact have occurred and to prevent any such practices from occurring or continuing to occur pursuant to United's filed tariff.

To carry out this mandate, a uniformly applied curtailment plan is required; one that necessarily involves several states would be virtually uncontrollable at the state regulatory level. Operating factors such as pressures at various system points, demands, and supplies are all relevant to a curtailment plan's operations, and jurisdiction to oversee all these factors is required—the states are powerless to control sufficiently and individually all these factors to provide fair service to consumers in each of their states and in other states. We must act, and our action must include direct sales, or else no effective control over curtailments will be possible.

In the past, when the extent of our jurisdiction to act has come into issue, the answer has required a return to the basic purposes of the Act. Many times stated, it is in the intent to give full protective coverage to the consumer. *Atlantic Refining Co.* v. *P.S.C. of New York*, 360 U.S. 378 (1959). Courts have often found it necessary in protecting the public interest that we rule in ways affecting direct sales. See *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 359 F. 2d 675, 682–3 (CA8, 1966). Full protection is obviously lost unless we oversee these curtailment plans in their entirety. If we refuse jurisdiction here on the grounds that all regulation affecting direct sales in any manner is forbidden by Section 1(b) of the Act as a matter of local concern, comprehensive regulation of United's operations during curtailments would be impossible, since a uniformly fair plan coordinated by the State commissions could not reasonably be expected to be

overseen by them. This is precisely the type of problem which the Natural Gas Act was intended to alleviate. Thus, our action here does not usurp state regulatory functions; it undertakes to do that which the states acting individually cannot effectively do and thus complements state regulation.

It is argued that even assuming the Commission has full jurisdiction over curtailment plans, the curtailment program must still be consistent with contractual obligations. We do not agree. Our determination concerning the curtailment plan must be undertaken without regard to the many and various contractual obligations of United. In considering the curtailment plan presented by United, we must appraise it to determine whether it is a proper and equitable approach in view of the anticipated extent of the curtailment, the relative interests and positions of the customers and others affected, and the overall gas supply situation. It is well settled that pipelines and other parties cannot by contract avoid their public interest obligations once our jurisdiction attaches. *California* v. *Lo Voca Gathering Co.*, 379 U.S. 366 (1965); *Sundry Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137 (1960).

The best example of why we cannot provide that curtailment programs meet all contractual obligations is the case before us. United's contracts provide generally that gas for domestic consumers has the highest priority and that remaining gas shall be prorated by United among its other customers. No provision is made in these contracts for priorities based upon other superior needs or purposes that may be valid and required by the public interest. For example, United's own proposed priority categories for industrial users, or for users of gas as a raw material, might be required by the public interest. Other priority categories might also be valid, such as gas used for national de-

fense purposes. Thus, merely because United's direct sale contracts fail to provide adequately for all situations related to service in the public interest—which we are bound to protect—should not and must not limit our authority here. Nor can it be supposed that the parties or the Commission should foresee at the time of certificate approval all possible public interest priorities that might supersede the contractual obligations to deliver gas.

There is no doubt that the present gas shortage has created new circumstances giving rise to the need to consider more carefully whether the sales of a pipeline are fully compensatory so as to enable the continued efficient and economic operation of pipelines in all areas, financial as well as operative, and to better enable the acquisition of gas supplies so desperately needed. Given these new circumstances, we must be free to act on a broad geographic front across state lines to mitigate the interstate effect of gas shortages consistent with Congress' intention "* * * to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. * * *" *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 520 (1947).

Some parties have argued that we may consider curtailment programs only under Section 7(b) of the Act as proposals to abandon service. We do not find that when curtailments are required due to a gas shortage that it is necessary to file a request for abandonment of service pursuant to Section 7(b) where, as here, the service reduction or stoppage foreseen is one of a temporary nature and where there is expectation that prior service levels will be resumed when gas supplies are available. We agree with our previous holdings in *City of Detroit* v. *Panhandle*

Eastern Pipe Line Co., 6 FPC 196, 203 (1947), that that we have jurisdiction and authority under Sections 4 and 5 of the Act to consider, approve, or establish curtailment programs as the circumstances may require in assuring reliability of service to the public served by interstate pipeline companies.

We could, if we so chose, amend, pursuant to Section 16 of the Act, our previous certificate orders relating to the transportation of gas by United for the sale to both resale and direct sale customers in order to provide for this emergency curtailment situation not foreseen at the time the orders were issued initially. We could prescribe service criteria for each individual direct customer under our continuing certificate authority that might not afford each direct customer precisely the same treatment as all others as a result of varying circumstances and public interest considerations. Instead, we have chosen, as the means of administering curtailment plans, to require, pursuant to Section 4 of the Act, the filing of tariff sheets prescribing those plans and affording all interested parties an opportunity to be heard. Of course, this approach does not hinder our authority to grant emergency relief where special circumstances require it in the public interest.[13] These filings receive RP docket numbers because they relate to tariff changes, not necessarily to rate changes. Our Statement of General Policy in Docket No. R-418, Order No. 431, made clear our intent to approach curtailments in this manner. In our view, the filing of tariff provi-

[13] See two orders issued July 2, 1971, in these dockets titled: Order Deferring Final Ruling On Motion For Interlocutory Order And Providing For Evidentiary Hearing, and Order Authorizing And Directing Interim Enforcement Of Curtailment Program Pending Final Determination Of Issues. See also our order herein issued July 28, 1971, titled Order Denying Motion For Reconsideration.

sions and providing hearings thereon will actually serve to reduce the opportunity for inequities between various individuals receiving gas from United.

On the other hand, it may be necessary to approve and order abandonment of service to various of United's direct or resale customers, should United's supply of natural gas be so depleted that the continuance of that service is unwarranted, or if the service or sale is no longer permitted by the public convenience or necessity. At a period when gas supplies are low, justification for the continuance of service may depend in part on whether such service makes a compensatory contribution to the pipeline so as to enable continued unimpaired operations. *Cf. South Georgia Natural Gas Co.*, 23 FPC 795, 797 (1960).

CATEGORY V

We now turn to United's tariff changes filed May 17, 1971, in Docket No. RP71–120, proposed to become effective for the 1971–1972 heating season. United submitted three proposed tariff sheets pursuant to our Order No. 431 that are to become part of its First Revised Volume No. 1, consisting of First Revised Sheet No. 71, superseding Original Sheet No. 71: Third Revised Sheet No. 72, superseding Second Revised Sheet No. 72; and Original Sheet No. 72–A.

These sheets would revise the existing Impairment of Deliveries provision contained in Section 12 of the General Terms and Conditions of United's tariff. They provide in Section 12.1 for a proration of impaired deliveries by setting out two new categories of service priority: Category II involving "process" gas and a new "lowest priority" Category V for power plant and industrial customers, whether served directly or indirectly by United, and paying a rate

less than the applicable city gate jurisdictional rate at a 100 percent load factor in the same rate zone. The revised sheets also would prohibit curtailed customers from offsetting curtailments by obtaining gas from another supplier who obtains gas either directly or indirectly from United, and prohibit any customer of United from selling gas to anyone to offset gas curtailed. In addition, they would add to Section 12.3 a statement that no payments or credits for substitute fuels will be made or given in the event of curtailment.[14] United's filing in this docket did not request a declaratory order but was filed pursuant to our Order No. 431.

Most of the twenty-nine initial briefs that were filed in this proceeding have objected to portions of these new tariff sheets filed by United, particulary that portion respecting the establishment of the low priority Category V. Besides the initial question of whether the Commission may exercise plenary jurisdiction over curtailment plans (resolved above), United's filing of May 17, 1971, raises, among others, the question of whether the Commission should approve curtailment plans that essentially define a class of customers for curtailment purposes as those who pay noncompensatory rates.

We find that the tariff language proposing Category V should be rejected for the reasons herein stated. United must file by November 2, 1971, new tariff sheets eliminating that language concerning Category V and realigning all customers into the four remaining categories for the Examiner's and our consideration on the merits. United attempts to justify its Category V upon a need to obtain reve-

[14] Section 12.3, entitled Demand Charge Adjustment and Substitute Fuel Payment Obligations, was first proposed on March 10, 1971, on Second Revised Sheet No. 72.

nues from its sales which are compensatory. This, it says, would help remedy the shortage by affording it an opportunity to spend more money to enable it to obtain new reserves. We find that there is little correlation between the need to curtail deliveries because of inadequate gas reserves and the degree of compensation received for the sale of the limited gas supplies which are available. If United believes certain sales are adversely affecting its ability to serve its customers and its ability to serve the public interest, it should instead request authority to abandon those sales pursuant to Section 7(b), regardless of any contracts affected.

SUBSTITUTE FUEL CLAUSE ADJUSTMENTS

We should now also consider questions before us regarding the substitute fuel clauses proposed in Section 12.3 of United's tariff. These questions first came before us when United filed, on March 31, 1971, in Docket No. RP71-99, a petition for a declaratory order requesting we issue an order determining and limiting United's obligations under substitute fuel clauses in five of its contracts with three customers purchasing gas under those contracts from United.[15] That docket was consolidated with the other dockets in this proceeding by order of September 15, 1971. We said the issues raised therein are questions of law not requiring an evidentiary hearing and are similar to the other issues in this proceeding.

Similar questions arise in Docket No. RP71-120 as a result of United's filing Original Sheet No. 72-A which, in part, added to Section 12.3 of the General Terms and Conditions of its tariff the language, "* * *

[15] Answers were filed by the three parties to the contracts: International Paper Company, Mississippi Power Company, and Mississippi Power & Light Company.

nor shall Seller be obligated to pay or credit such customers any sums with respect to substitute fuels burned by such customers during such a period of proration or interruption."

We decline to render a declaratory order in Docket No. RP71-99, and so dismiss United's petition, because it requests an interpretation of contract terms unnecessary in light of our action herein exercising jurisdiction over curtailment plans.

Implementation of the curtailment plan itself, pursuant to our procedures, would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts affected by curtailments that may be initiated in the courts. No additional tariff language like that proposed in Section 12.3 on Original Sheet No. 72-A is necessary to limit liability under contracts when agencies' orders, rules, or regulations authorize actions contrary to those contracts. In *Michigan Consoliated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (CA6, 1949), the court refused to grant relief to Michigan Consolidated despite the existence of a contract between that company and Panhandle. The court said (173 F.2d at 789):

> The collateral relief prayed by Consolidated is also, in our judgment, beyond the jurisdiction of the court to order without interfering with the regulatory powers of the Commission. * * * We do hold that adequacy and impartiality of service, in the light of existing circumstances, is within Commission control. This must be so if control over rates means anything, since adequate service is a necessary concomitant in the fixing of reasonable rates. * * * If the Commission has no authority to order adequate service to customers, in view of all the conditions and circumstances involved, the basic purpose of the Natural Gas Act fails of realization. We can

> attribute to the Congress no purpose to withhold from the Commission control over services. The power to prevent preferences and discrimination both as between individuals and classes, carried with it by necessary and inescapable implication, authority to regulate service.

In a similar case, *Panhandle Eastern Pipe Line Co. v. Michigan Consolidated Gas Co.*, 177 F.2d 942 (CA6, 1949) the court found invalid a lower court's temporary injunction granted to prevent curtailment of gas delivery from Panhandle to its distributor Michigan Consolidated. In so ruling the court said (177 F.2d at 944–45):

> In the Detroit case we were of the view that the Commission had power to prescribe emergency service rules and regulations with respect to deliveries of gas by a pipe line company to a distributor without regard to contract requirements * * *.
>
> * * * As we have already seen, it is within the Commission's power to regulate service by emergency orders without respect to contract obligations.

The Supreme Court recognized this principle in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968), saying, "* * * the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests." See also *L.N. Jackson & Company v. Royal Norwegian Government*, 177 F.2d 694, 697 (CA2, 1949), stating, "For it is well settled that a contractual duty is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prohibited

by an administrative order made with due authority by an officer of the United States. Restatement, Contracts § 458(b), 1932; Williston on Contracts, §§ 1938, 1939, Rev. Ed. 1938."

Therefore, the language in United's tariff precluding the operation of substitute fuel clauses when curtailments are properly implemented is unnecessary.

GAS CURTAILMENT OFFSET

United has proposed tariff language in Docket No. RP71-120 that would prohibit the purchase or sale of gas between a customer of United and another customer of United to offset gas curtailed by United. That language is:

> Furthermore, no customer so required to curtail will obtain gas to offset such curtailment from a supplier who obtains such offset gas either directly or indirectly from Seller, nor shall any customer of Seller sell gas to anyone to offset gas curtailed in accordance herewith.[16]

We reject this proposed language as beyond our jurisdiction to approve. Our jurisdiction over the disposition of natural gas ends when it reaches the hands of a nonjurisdictional person such as a distributor purchasing for resale. This language would in effect attempt to extend our jurisdiction over the disposition of gas by a local distributor, a matter within the province of the local regulatory body. We will of course consider the past and planned disposition of volumes by the customers when ruling upon allocations for the various customers, but after allocation among United's customers, we leave for the states or other local bodies the job to oversee the distribution of

[16] See United's Third Revised Sheet No. 72 and Original Sheet No. 72-A of its FPC Gas Tariff, First Revised Volume No. 1.

that gas by the customers at the local level. This proposed language is not an integral part of United's curtailment plan: the later disposition by one of United's customers of volumes sold by United, or the purchase by United's customers of gas originating from United, does not affect United's ability to limit the total volume of gas delivered by it. There is no showing that this proposed tariff language would have the slightest beneficial effect on the gas supply of a single customer of United.

PENDING MOTIONS

Also before us are four motions. One was filed on August 12, 1971, by Marquette Cement Manufacturing Company and Container Corporation of America (Marquette and Container Corp.) to sever for immediate consideration an issue regarding the validity of United's establishment of a new low priority Category V in its priority list for curtailments.[17] In the alternative, Marquette and Container Corp. ask that, if the Commission permits Category V to become effective, that it do so conditionally upon an express agreement by United to refund, if the Commission ultimately disapproves this category, the differences between the rates now paid under contract and the higher contract rates paid by any customer pursuant to a contract entered into as a result of this priority system. Four answers representing eight direct customers of United were filed in support of the motion. United opposes the motion.

In light of our disposition regarding Category V above, the motion of Marquette and Container Corp. is now moot and should be dismissed.

[17] This Category consists of those customers, other than domestic, purchasing gas at the city gate 100% load factor zone rate.

Two motions were also filed requesting enlargement of the suspension period of United's proposed tariff sheets which were filed May 17, 1971, in Docket No. RP71-120; one by Gulf States Utilities Co. on September 9, 1971, and one by New Orleans Public Service Inc. on September 13, 1971.[18] Gulf States also requests that we defer the effective date of United's tariff until 30 days after the Commission passes upon the issues. Mississippi Power & Light answered in support of these motions on September 15, 1971. Our disposition above regarding the propriety of Category V removes the most significant basis and reason for these two motions. In addition, we have previously stated in our Order of July 2, 1971, in these proceedings, which directed interim enforcement of the curtailment program, United should be required to carry out its filed curtailment plan pending a decision on the issues. We do not defer from that principle, and the motions must be denied.

A fourth motion, filed on August 13, 1971, by International Paper Company and Scott Paper Company seeks enlargement of the extension period of that portion of United's proposed tariff that would prohibit a customer from reselling gas to other United customers to offset gas curtailed by United.[19] This provision was filed by United in Docket No. RP71-120. Again, our action above moots this request and the motion should be dismissed.

The Commission further finds:

(1) United Gas Pipe Line Company is engaged in the transportation and sale for resale in inter-

[18] Gulf States filed a follow-up motion for expeditious consideration on September 15, 1971.

[19] See United's Third Revised Sheet No. 72 and Original Sheet No. 72-A of its FPC Gas Tariff, First Revised Volume No. 1.

state commerce of natural gas and is a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission in its order of November 10, 1942, in Docket No. G–232, 3 FPC 863.

(2) Plenary jurisdiction resides within this Commission to accept, modify, and/or approve the curtailment plans proposed by United Gas Pipe Line Company or any other jurisidictional pipeline company relating to gas transported both to resale and direct sale customers.

(3) The curtailment priority Category V set forth on the proposed Third Revised Sheet No. 72 should be rejected as being an improper provision in a curtailment plan.

(4) The proposed language on Third Revised Sheet No. 72 and Original Sheet No. 72–A stating, "Furthermore, no customer so required to curtail will obtain gas to offset such curtailment from a supplier who obtains such offset gas either directly or indirectly from Seller, nor shall any customer of Seller sell gas to anyone to offset gas curtailed in accordance herewith" should be rejected as implying an extension of Commission jurisdiction over the local distribution of gas.

(5) The petition for a declaratory order in Docket No. RP71–99 should be dismissed.

(6) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the motion of Marquette Cement Manufacturing Company and Container Corporation of America, filed August 12, 1971, to sever and decide whether United's proposed curtailment priority classification, Category V, is proper, be dismissed.

(7) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the motions of Gulf States Utilities Company, filed September 9,

1971, and of New Orleans Public Service, Inc., filed September 13, 1971, to enlarge the suspension period for the effective date of United's proposed tariff sheets, First Revised Sheet No. 71, Third Revised Sheet No. 72, and Original Sheet No. 72–A, be denied.

(8) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the motion of International Paper Company and Scott Paper Company filed August 13, 1971, for enlargement of the suspension period of a portion of United's proposed tariff, be dismissed.

(9) The motion for oral argument filed September 22, 1971, by the State of Louisiana, the Louisiana Municipal Association, and the Parish of Cameron, Louisiana, should be denied.

The Commission orders:

(A) Issues in these consolidated proceedings not here decided are remanded to the Presiding Examiner for his initial decision regarding the proper interpetation and implementation of United's proposed curtailment plans, and the reasonableness thereof as set forth in both its petition for declaratory order, as amended and supplemented, in Docket No. RP71–29, and its filing, as amended and supplemented, pursuant to our Order No. 431, in Docket No. RP71–120. Such initial decision should also include findings concerning the environmental impact of United's curtailments.

(B) The proposed language on Third Revised Sheet No. 72 relating to Category V, and the proposed language on Third Revised Sheet No. 72 and Original Sheet No. 72–A relating to the offsetting of curtailed gas, as quoted herein, are rejected. United Gas Pipe Line Company shall file new proposed sheets by November 2, 1971, deleting that language from its tariff.

(C) The petition for a declaratory order filed by United Gas Pipe Line Company in Docket No. RP 71–99 is dismissed.

(D) The motion of Marquette Cement Manufacturing Company and Container Corporation of America is dismissed.

(E) The motions of Gulf States Utilities Company and New Orleans Public Service Inc. are denied.

(F) The motion of International Paper Company and Scott Paper Company is dismissed.

(G) The motion for oral argument by the State of Louisiana; the Louisiana Municipal Association, and the Parish of Cameron, Louisiana, is denied.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

APPENDIX F

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

CERTIFICATES—DIRECT SALE CONTRACTS—GAS SUPPLY—JURISDICTION—PUBLIC INTEREST—SERVICE—TARIFFS—TRANSPORTATION IN INTERSTATE COMMERCE

Before Commissioners: JOHN N. NASSIKAS, *Chairman;* JOHN A. CARVER, JR., ALBERT B. BROOKE, JR., PINKNEY WALKER, and RUSH MOODY, JR.

UNITED GAS PIPE LINE COMPANY
(Docket Nos. RP71-29, RP71-120, RP71-99)

(Opinion No. 606-A)

OPINION AND ORDER DENYING REHEARING AND DENYING MOTIONS TO REOPEN RECORD

(Issued December 3, 1971)

Nine applications and petitions for rehearing and clarification of the Commission's Opinion No. 606 and Order issued October 5, 1971, have been filed by twelve

intervenors in this proceeding.[1] In addition, the State of Louisiana, *et al.*, has petitioned for a reopening of the record.

REQUESTS FOR REHEARING AND MODIFICATION

The petitions requesting rehearing and modification do not convince us that rehearing should be granted or that our Opinion No. 606 should be modified. Thus we view our orders in Opinion No. 606 and on rehearing here to be final and fully reviewable ~~upon~~ the matters decided therein.

Several petitioners contend the Commission erred in finding it has plenary jurisdiction over curtailment plans of jurisdictional pipelines.[2] No arguments not previously considered concerning our authority under the Natural Gas Act were raised by the petitions except that the State of Louisiana claims that there is no express grant of authority in the Natural Gas Act permitting the Commission to allocate a jurisdictional pipeline's scarce gas supplies to even resale customers and says Commission action is "without the benefit of any undisputed authority or congressional standards."[3] That contention was settled adversely to Louisiana's position in *Panhandle Eastern Pipe Line*

[1] In alphabetical order they are: Gulf States Utilities Company; International Paper Company; Louisiana Power & Light Company; Mississippi Power & Light Company; Mississippi Power Company; Mobile Gas Service Corporation, jointly with Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District; New Orleans Public Service Inc.; Olinkraft, Inc.; and State of Louisiana, jointly with Louisiana Municipal Association, and Parish of Cameron, Louisiana.

[2] Gulf States Utilities Company, Louisiana Power & Light Company, Mississippi Power and Light Company, Mississippi Power Company, Mobile Gas Service Corp., *et al.*, New Orleans Public Service Inc., and State of Louisiana.

[3] Mobile Gas Service Corp., *et al.*, also discuss this in their petition for rehearing.

Co. v. *F. P. C.*, 232 F.2d 467 (3rd Cir. 1956), *cert. den.*, 352 U.S. 891 (1956). In that case the Commission refused to allow Panhandle to use its interruptible gas to make direct industrial sales instead of selling such gas to its resale customers. The court affirmed the Commission's order, holding that the Commission has the power under the Act to control all deliveries of gas so as to prevent Panhandle from discriminating against its existing customers. The court pointed out that although the States may fix the rates at which gas is sold to direct-sale customers, the State "* * * tribunals in turn have no warrant to interfere in the Commission's allocations" (232 F.2d at 473).

Our Opinion No. 606 made clear that the basis of our jurisdiction to act over curtailments, respecting not only resales but direct-sale customers as well, derives from Sections 1(b), 4, 5, 7, and 16 of the Natural Gas Act. Decisions in proceedings before the Supreme Court and other appellate courts, the history of natural-gas regulation during a previous period of curtailments, and the basic purposes and policies of the Natural Gas Act confirm this authority, as detailed in Opinion No. 606.

Mississippi Power Company argues that if curtailment plans do not directly apply to rates and charges they should not be a part of United's tariff. Our Regulations require the filing of additional information regarding the classifications and practices of a pipeline company affecting services as well as those affecting rates and charges,[4] and the Commission has authority to prevent undue discrimination. See *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 324 U.S. 635, 647 (1945). The form of filing is not the controlling consideration.

[4] Sections 154.1 and 155.1 of the Commission's Regulations.

Several petitioners[5] request a hearing or clarification of our ruling and rationale finding as unnecessary, but permissible, United's proposed language regarding substitute fuel clause adjustments. All concur in our rejection of that language and in our dismissal of United's petition in Docket No. RP71-99, but object to our bases for doing so. In clarification, this Commission has the responsibility and the authority to protect all consumers from efforts by pipelines to grant preferences in service to particular customers or classes of customers in times when gas shortage precludes fulfillment of all contracts for delivery of gas. A claim of preference in service directly or, in the case of substitute fuel clauses, indirectly, cannot operate to deprive this Commission of authority to assure fair and equitable curtailment plans. The pipeline companies cannot be faced with the dilemma of providing nondiscriminatory service as ordered by the Commission and at the same time insure liability for breach of contracts which grant discriminatory preferences, directly or indirectly. Thus, the Commission's authority to preclude undue preferences and discriminations in service operates to preempt any contract provisions inconsistent with the exercise of that authority as not being in the public interest.

International Paper argues that no question is involved of specific relief under the substitute fuel adjustment clauses in United's contracts and that therefore the cases relied upon by the Commission

[5] Gulf States, International Paper, Mississippi Power & Light Company, Mississippi Power Company, Olinkraft, Inc., and State of Louisiana.

are inapposite.[6] International Paper misconstrues our purpose for the citations. They serve to point out that this Commission has the authority to issue orders (such as orders approving a curtailment plan) to carry out the purposes of the Natural Gas Act regardless of existing contractual commitments (such as direct sales commitments) of the natural-gas companies subject to our jurisdiction. While those cases are related to contracts involving sales for resale, we believe, as Opinion No. 606 made clear, that the principle they stand for is equally applicable to direct sales. *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 324 U.S. 635, 647 (1945).

CONSIDERATION OF OTHER ISSUES

Louisiana asks that the proceedings be reopened for receipt of further evidence to determine whether United either deliberately or negligently brought its systemwide gas shortage upon itself. This question was already briefed by the parties and the question was remanded with other issues to the Examiner for his decision.

Louisiana also asks us to specify that the remand to the Examiner be broadened to include issues raised in Louisiana's reply brief concerning whether United's curtailment classifications should also distinguish between full and partial requirements customers and whether they should distinguish between localities within Louisiana and localities elsewhere. These issues are questions relating to the propriety and implementation of United's curtailment plan—questions which were specifically remanded to the Examiner.

[6] *Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (6th Cir. 1949); *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942 (6th Cir. 1949); and *Permian Basin Area Rate Cases*, 390 U.S. 747, 748 (1968).

for his decision. The arguments of Louisiana are thus available to the Examiner for his consideration.

Louisiana further requests that the remand be broadened to consider whether this Commission has abused its discretion in approaching the national gas shortage on a pipeline-to-pipeline basis rather than upon a nationwide basis which would permit consideration of equities between gas-producing States and gas-consuming States, and whether the failure to conduct a nationwide allocation study to allocate gas between States is prejudicial to Louisiana localities. Without reaching the question of the extent of our jurisdiction to allocate the gas supply on a nationwide basis or after a nationwide allocation study, we have determined that the proper scope of this proceeding is that set forth in Opinion No. 606.

Louisiana additionally asks that the record be reopened pursuant to our direction to the Examiner in Opinion No. 606 to make findings concerning the environmental impact upon the health of Louisiana residents of United's curtailments. Louisiana avers that presently the record evidence is limited to the economic impact of curtailments. Louisiana's request is more properly directed to the Examiner who now has the proceedings before him as a result of our remand in Opinion No. 606 of the issues not there decided.

Olinkraft, Inc., notes that our Opinion No. 606 did not correctly state its position regarding the interim settlement approved on December 29, 1971. To the extent that the transcript references cited by Olin-

[1] Louisiana requests that official notice be taken of its appendices to its reply brief. Because we leave for the Examiner to consider the relevance of Louisiana's contentions, we believe he should rule upon that request since he will be better able, at this time, to assess their materiality and relevance to these proceedings.

kraft indicate a contrary position, we so recognize that as Olinkraft's position at that time.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the applications filed by the above-named petitioners present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 606 and accompanying order of October 5, 1971, except as that Opinion has been clarified above.

The Commission orders:

The applications for rehearing of Opinion No. 606 filed by the above-named petitioners are denied.

By the Commission. (Commissioner Carver dissenting filed a separate statement appended hereto.)

(SEAL.) KENNETH F. PLUMB,
Secretary.

UNITED GAS PIPE LINE COMPANY

(Docket Nos. RP71-29, RP71-120, RP71-99)

(Issued December 3, 1971)

CARVER, *Commissioner*, dissenting:

By reason of absence, I did not participate in Opinion 606. I dissent to the order denying rehearing principally because the Commission has passed up an opportunity to correct some of the extravagances of jurisdictional assertions therein, a deficiency not cured by the circular statement that ". . . we have determined that the proper scope of this proceeding is that set forth in Opinion 606."

I continue in the conviction, expressed principally in dissenting statements over the past years, that the Natural Gas Act and the Federal Power Act delimit this Commission's jurisdiction according to a fair reading of their terms. See *Florida Power & Light*

Company, Docket No. E-7210, 37 FPC 544, March 20, 1967, at p. 556; *Algonquin Gas Transmission Company, et al.*, 37 FPC 1128, June 27, 1967, at p. 1146; *Ohio Power Company, et al.*, 38 FPC 881, November 3, 1967, at p. 890; *Alabama-Tennessee Natural Gas Company, et al.*, 38 FPC 1069, November 30, 1967, at p. 1082; *Hugoton Production Company*, 41 FPC 490, April 17, 1969, at p. 504; *William Harvey Denman, Trustee, et al.* v. *J. M. Huber Corporation*, 42 FPC 164, July 23, 1969, at p. 175; Reliability of Electric and Gas Service, Docket No. R-405, Policy Statement, Notice of Investigation and Proposed Rulemaking with Respect to Developing Emergency Plans, 44 FPC ——, November 4, 1970; *Arkansas Louisiana Gas Company*, Docket No. RP71-122, Order Granting Emergency Modification of Curtailment Plan Pending Final Commission Decision, issued November 30, 1971.

On a separate but related point, I also would grant the relief now requested by International Paper and Mississippi Power and Light, asking moderation of the declaration that the Commission's order "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief." This is a self-serving dictum not binding on anyone, least of all the courts who must ultimately rule upon the effect of our orders. I very much doubt that the judicial branch can be foreclosed from awarding damages for breach of a substitute fuel clause in a contract which neither required nor received the approval of this Commission, to take the one example cited by International Paper. A proper sense of comity in judicial-administrative relations calls for an abandonment of this fruitless attempt to delimit judicial remedy.

JOHN A. CARVER, JR.,
Commissioner.

APPENDIX G

The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part:

Section 1:

> (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.
>
> (c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received

is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 4:

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep

upon in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its rea-

sons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect;[1a] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that,

any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7:

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or

municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was

bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

Section 16:

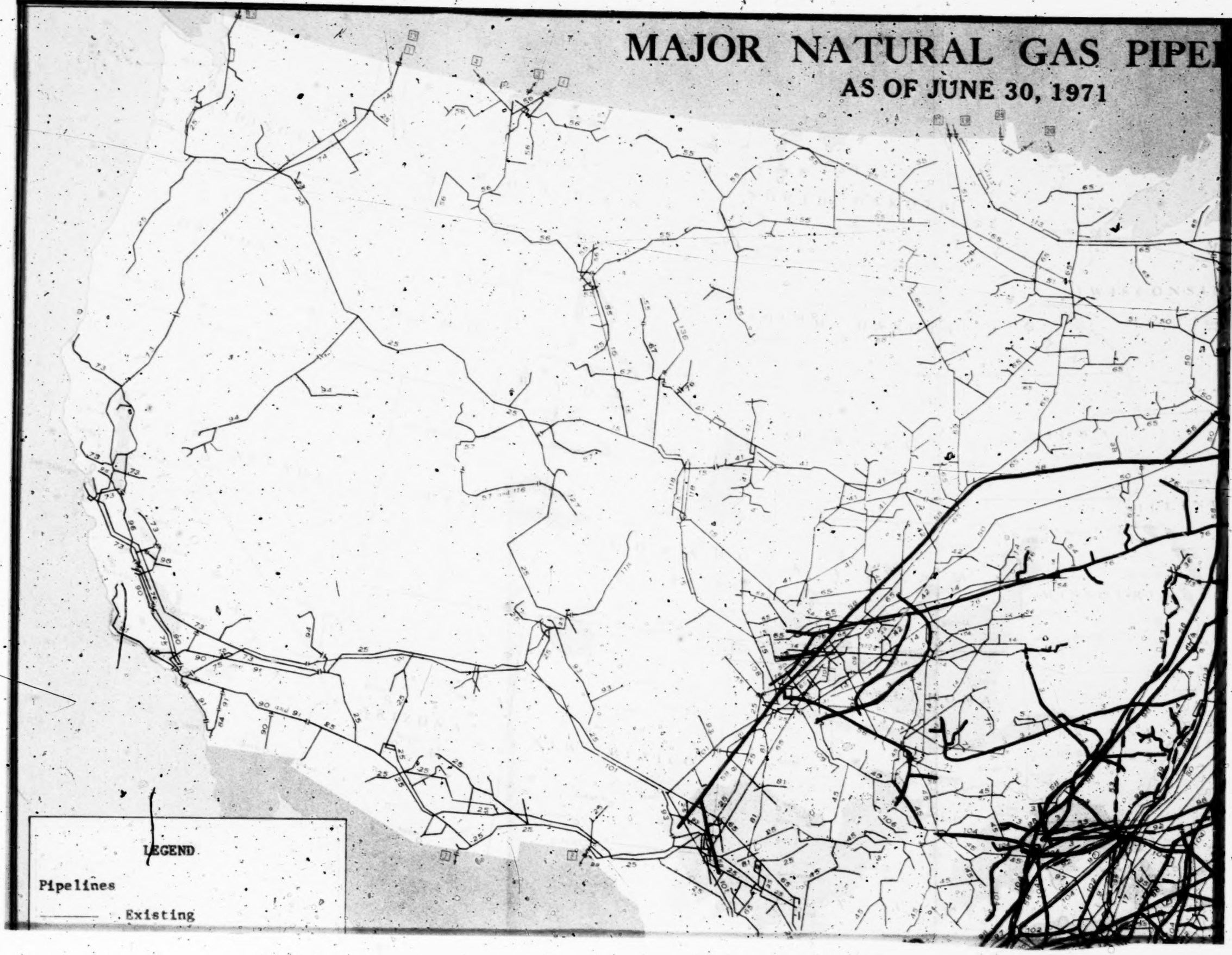
The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or

forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

U.S. GOVERNMENT PRINTING OFFICE: 1972

MAJOR NATURAL GAS PIPE

AS OF JUNE 30, 1971



LEGEND

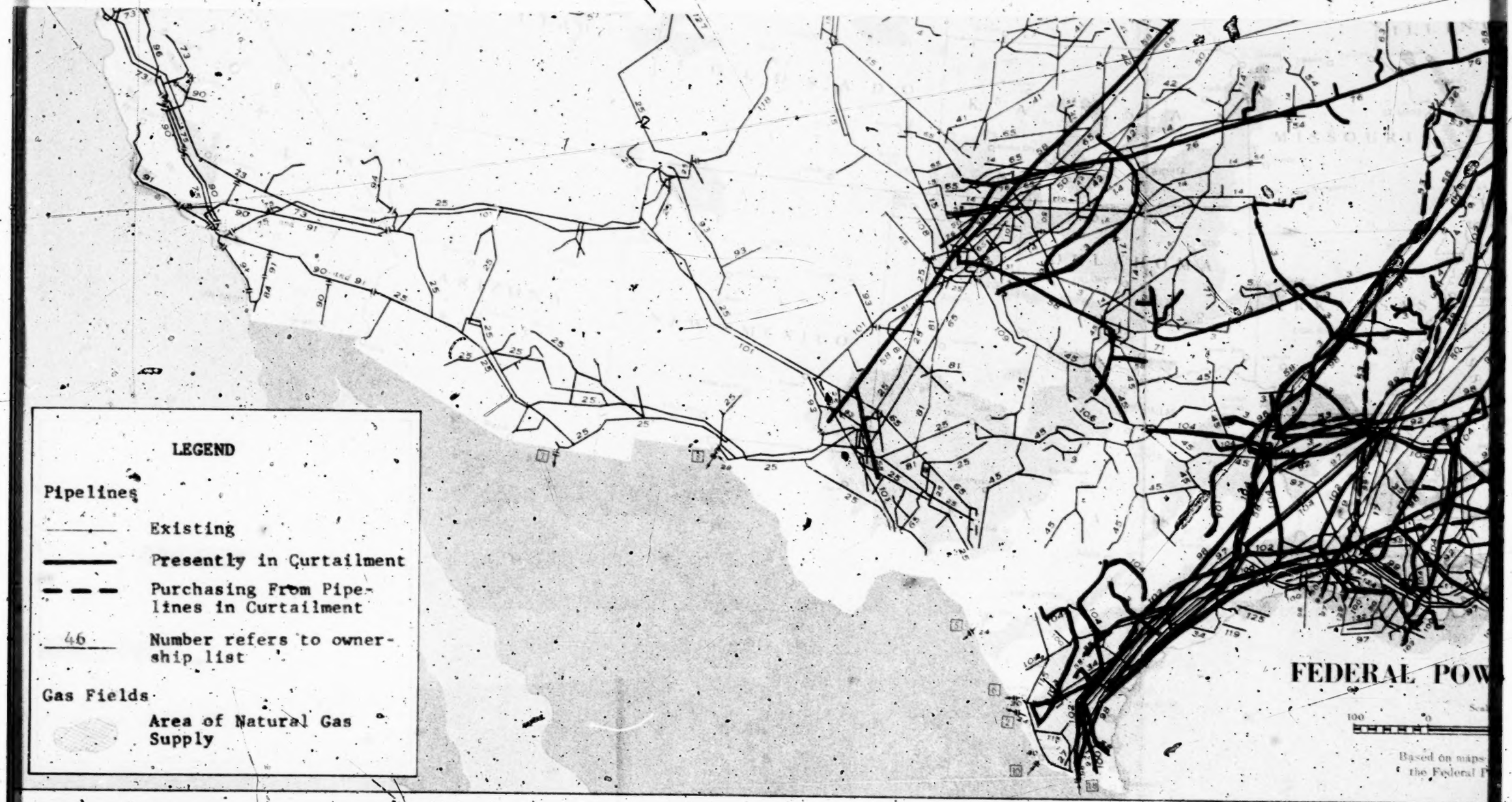
Pipelines

——— Existing

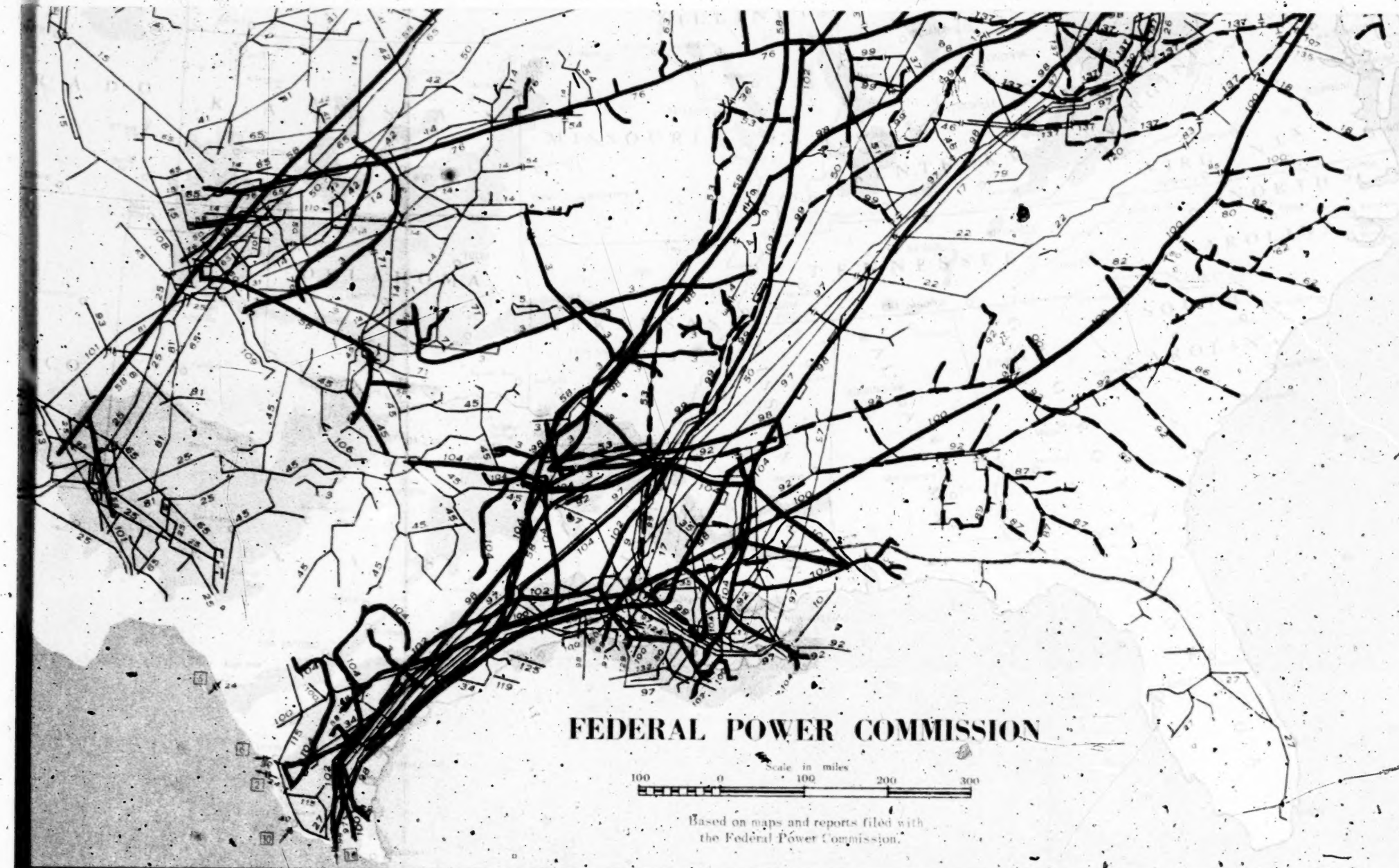
AJOR NATURAL GAS PIPELINES

AS OF JUNE 30, 1971

APPENDIX H



1 *Alabama-Tennessee Natural Gas Co.
2 *Algonquin Gas Transmission Co.
3 *Arkansas Louisiana Gas Co.
4 *Arkansas-Missouri Power Co.
5 *Arkansas Oklahoma Gas Corp.
6 *Associated Natural Gas Co.
7 Carolina Pipe Line Co.
8 Central Louisiana Electric Co., Inc.
10 *Chandeleur Pipe Line Co.
13 Cincinnati Gas & Electric Co., The
14 *Cities Service Gas Co.
15 *Colorado Interstate Gas Co.
17 *Columbia Gulf Transmission Co.
18 Commonwealth Natural Gas Corp.
19 Consumers Power Co.
21 East Ohio Gas Co., The
22 *East Tennessee Natural Gas Co.
23 *Eastern Shore Natural Gas Co.
25 *El Paso Natural Gas Co.
26 *Equitable Gas Co.
27 *Florida Gas Transmission Co.
31 High Plains Natural Gas Co.
34 Houston Pipe Line Co.
35 *Mid Louisiana Gas Co.
36 Illinois Power Co.
37 Indiana Gas Co., Inc.
38 *Iowa Energy Corp.
39 *Iroquois Gas Corporation
41 *Kansas-Nebraska Natural Gas Co., Inc.
42 Kansas Power & Light Co.
44 *Lake Shore Pipe Line Co.
45 *Lone Star Gas Company
46 Louisville Gas & Electric Co.
48 Michigan Consolidated Gas Co.
49 *Michigan Gas Storage Co.
50 *Michigan Wisconsin Pipe Line Co.
51 *Midwestern Gas Transmission Co.
53 *Mississippi River Transmission Corp.
54 Missouri Public Service Co.
55 *Montana-Dakota Utilities Co.
56 Montana Power Co., The
57 *Mountain Fuel Supply Co.
58 *Natural Gas Pipeline Co. of America
59 New Jersey Natural Gas Co.
61 Niagara Mohawk Power Corp.
62 North Carolina Natural Gas Corp.
63 Northern Illinois Gas Co.
64 Northern Indiana Public Service Co.
65 *Northern Natural Gas Co.
67 *Northern Utilities, Inc., Wyo.
68 Northwest Public Service Co.
71 Oklahoma Natural Gas Co.
73 Pacific Gas & Electric Co.
74 *Pacific Gas Transmission Co.
75 Pacific Lighting Service & Supply Co.
76 *Panhandle Eastern Pipe Line Co.
78 *Pennsylvania Gas Co.
79 Peoples Natural Gas Co., The
80 Petroleum Exploration Inc.
80 Piedmont Natural Gas Co., Inc.
81 Pioneer Natural Gas Co.
82 Public Service Co. of N.C., Inc.
83 Roanoke Gas Co.
84 San Diego Gas & Electric Co.
85 *Shenandoah Gas Co.
86 South Carolina Electric & Gas Co.
87 *South Georgia Natural Gas Co.
88 South Jersey Gas Co.
89 Southeast Alabama Gas District
90 Southern California Gas Co.
91 Southern Counties Gas Co. of Calif.
92 *Southern Natural Gas Co.
93 Southern Union Gas Co.
94 *Southwest Gas Corp.
95 Southwestern Virginia Gas Co.
96 *Standard Pacific Gas Lines, Inc.
97 *Tennessee Gas Pipeline Co.
98 *Texas Eastern Transmission Corp.
99 *Texas Gas Transmission Corp.
100 *Transcontinental Gas Pipe Line Corp.
101 *Tuscarora Pipeline Co.
102 *Texas Utilities Gas Co.
104 *United Gas Pipe Line Co.
105 *United Natural Gas Co.
106 Upham Gas Company
107 *Washington Gas Light Co.
108 *Western Gas Interstate Co.
109 West Texas Utilities Co.
110 *Zenith Nat. Gas Co.
113 *Great Lakes Gas Transmission Co.
114 *Great Plains Natural Gas Co.
115 *South Texas Nat. Gas Gathering Co.
116 Utah Natural Gas Co.
117 Vermont Gas Systems, Inc.
118 Western Slope Co.
119 *Blue Dolphin Pipe Line Co.
120 *Consolidated Gas Supply Corp.
121 *Granite State Gas Transmission, Inc.
124 *Sabine Pipe Line Co.
125 *Black Marlin Pipeline Co.
127 *Consolidated Natural Gas Corporation
128 Lawrence Gas Co.



FEDERAL POWER COMMISSION

Scale in miles

100 0 100 200 300

Based on maps and reports filed with the Federal Power Commission.

1 Oklahoma Natural Gas Co.
2 Pacific Gas & Electric Co.
3 *Pacific Gas Transmission Co.
4 Pacific Lighting Service & Supply Co.
5 *Panhandle Eastern Pipe Line Co.
6 *Pennsylvania Gas Co.
7 Peoples Natural Gas Co., The
8 Petroleum Exploration Inc.
9 Piedmont Natural Gas Co., Inc.
10 Pioneer Natural Gas Co.
11 Public Service Co. of N.C., Inc.
12 Roanoke Gas Co.
13 San Diego Gas & Electric Co.
14 *Shenandoah Gas Co.
15 South Carolina Electric & Gas Co.
16 *South Georgia Natural Gas Co.
17 South Jersey Gas Co.

89 *Southeast Alabama Gas District
90 Southern California Gas Co.
91 Southern Counties Gas Co. of Calif.
92 Southern Natural Gas Co.
93 Southern Union Gas Co.
94 *Southwest Gas Corp.
95 Southwestern Virginia Gas Co.
96 *Standard Pacific Gas Lines, Inc.
97 *Tennessee Gas Pipeline Co.
98 *Texas Eastern Transmission Corp.
99 *Texas Gas Transmission Corp.
100 *Transcontinental Gas Pipe Line Corp.
101 *Transwestern Pipeline Co.
102 *Trunkline Gas Co.
104 *United Gas Pipe Line Co.
105 *United Natural Gas Co.
106 Upham Gas Company

107 *Washington Gas Light Co.
108 *Western Gas Interstate Co.
109 West Texas Utilities Co.
110 *Zenith Nat. Gas Co.
113 *Great Lakes Gas Transmission Co.
114 *Great Plains Natural Gas Co.
115 *South Texas Nat. Gas Gathering Co.
116 Utah Natural Gas Co.
117 Vermont Gas Systems, Inc.
118 Western Slope Co.
119 *Blue Dolphin Pipe Line Co.
120 *Consolidated Gas Supply Corp.
121 *Granite State Gas Transmission, Inc.
124 *Bubito Pipe Line Co.
125 *Black Marlin Pipeline Co.
127 *Cascade Natural Gas Corporation
128 St. Lawrence Gas Co.

129 Columbia Offshore Pl. Co.
130 Northern Utilities, Me.
132 Sea Robin Pipeline Co.
133 *Midwest Natural Gas Co.
134 Inter-City Minnesota Pipeline Ltd.
135 Columbia LNG Co.
136 *McCulloch Interstate Gas Corp.
137 *Colombia Gas Transmission Corp.

*Jurisdictional Companies

U.S. Imports from Canada & Mexico

1 Pacific Gas Trans., 74 from Alberta Southern Gas Co. Ltd. & West Coast Trans. Co., Ltd.
4 Montana Power Co., 56 from Canadian Montana Pipe Line Inc.
9 St. Lawrence Gas Co., 128 from Niagara Gas Trans., Ltd.
10 City of Rome, 40 from Petroleos Mexicanos
12 Midwestern Gas Trans. Co., 51 from Trans-Canada Pipe Line Ltd.
13 El Paso Natural Gas Co., 24 from West Coast Trans. Co., Ltd.
14 Vermont Gas Systems Inc., 117 from Trans-Canada Pipe Line Ltd.
15 Tennessee Gas Pipeline Co., 97 from Trans-Canada Pipe Line Ltd.
18 Texas Eastern Trans. Corp., 98 from Petroleos Mexicanos
19 Great Lakes Gas Transmission Co., 113 from Trans-Canada Pipe Line Ltd.
20 Inter-City Minnesota Pipelines Ltd., 134 from Trans-Canada Pipe Line Ltd.

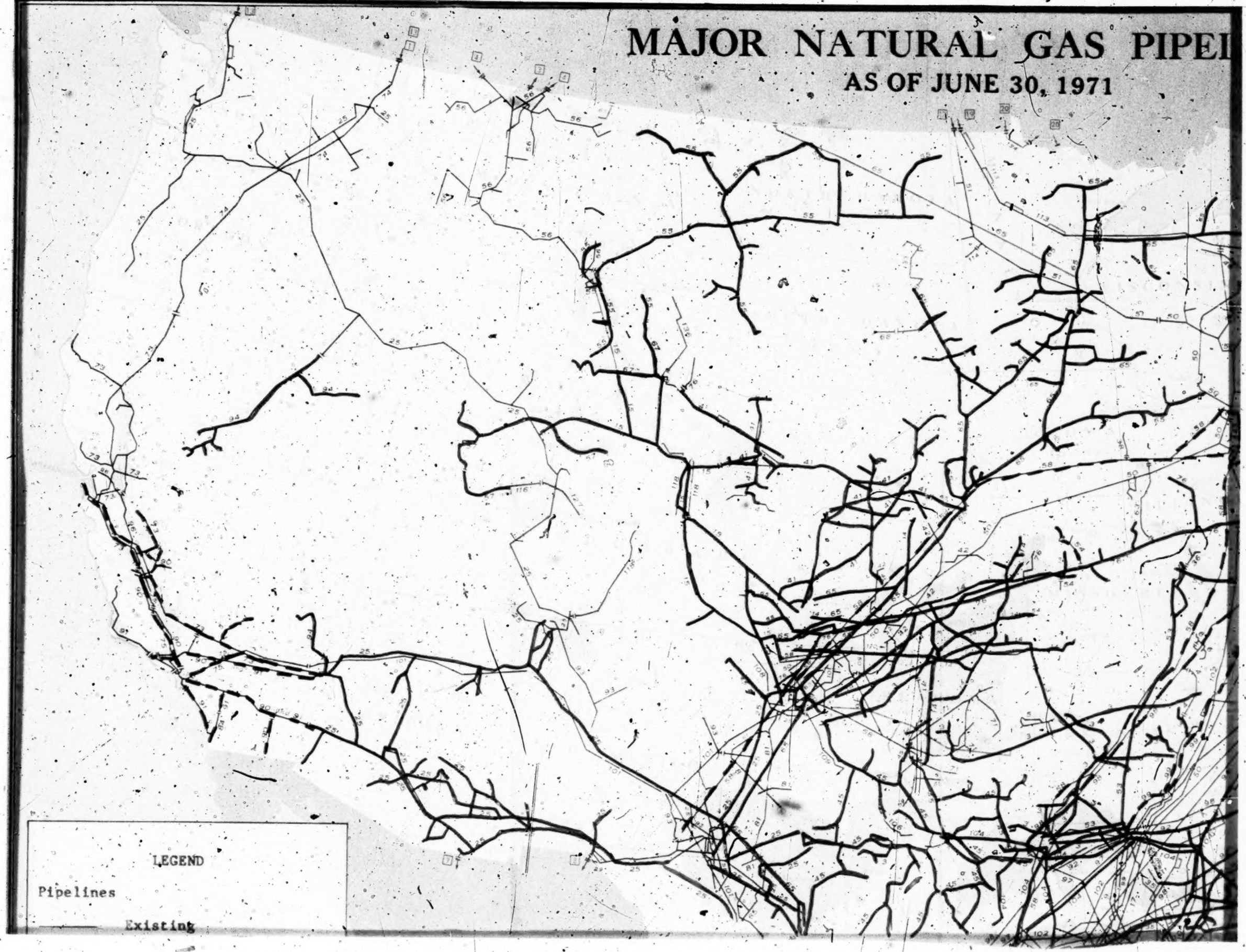
U.S. Exports to Canada & Mexico

2 Texas Gas Util. Co., 54 to Compania Minera Asarco, S.A.
3 The Montana Power Co., 56 to Border Util., Ltd. & Milk River Gas Co., Ltd.
5 Texas Gas Util. 24 to La Consolidada, S.A. de C.V.
6 Pipe Nacional de Gas, S.A.
7 United Gas Inc. to Compania de Gas de Nuevo Laredo, S.A.
7 El Paso Nat. Gas Co., 25 to Compania Minera de Cananea, S.A. de C.V.
8 Del Norte Gas Co., 29 to Gas Natural de Juarez S. Juarez Gas Co.
11 Panhandle Eastern P.L. Co., 76 to Tecumseh Gas Storage Ltd. & Union Gas of Canada Ltd.
16 Tennessee Gas Pipeline Co., 97 to Trans-Canada Pipe Line Ltd.
17 Great Lakes Gas Transmission Co., 113 to Trans-Canada Pipe Line Ltd.

FPC No. 23

MAJOR NATURAL GAS PIPEL

AS OF JUNE 30, 1971



LEGEND

Pipelines

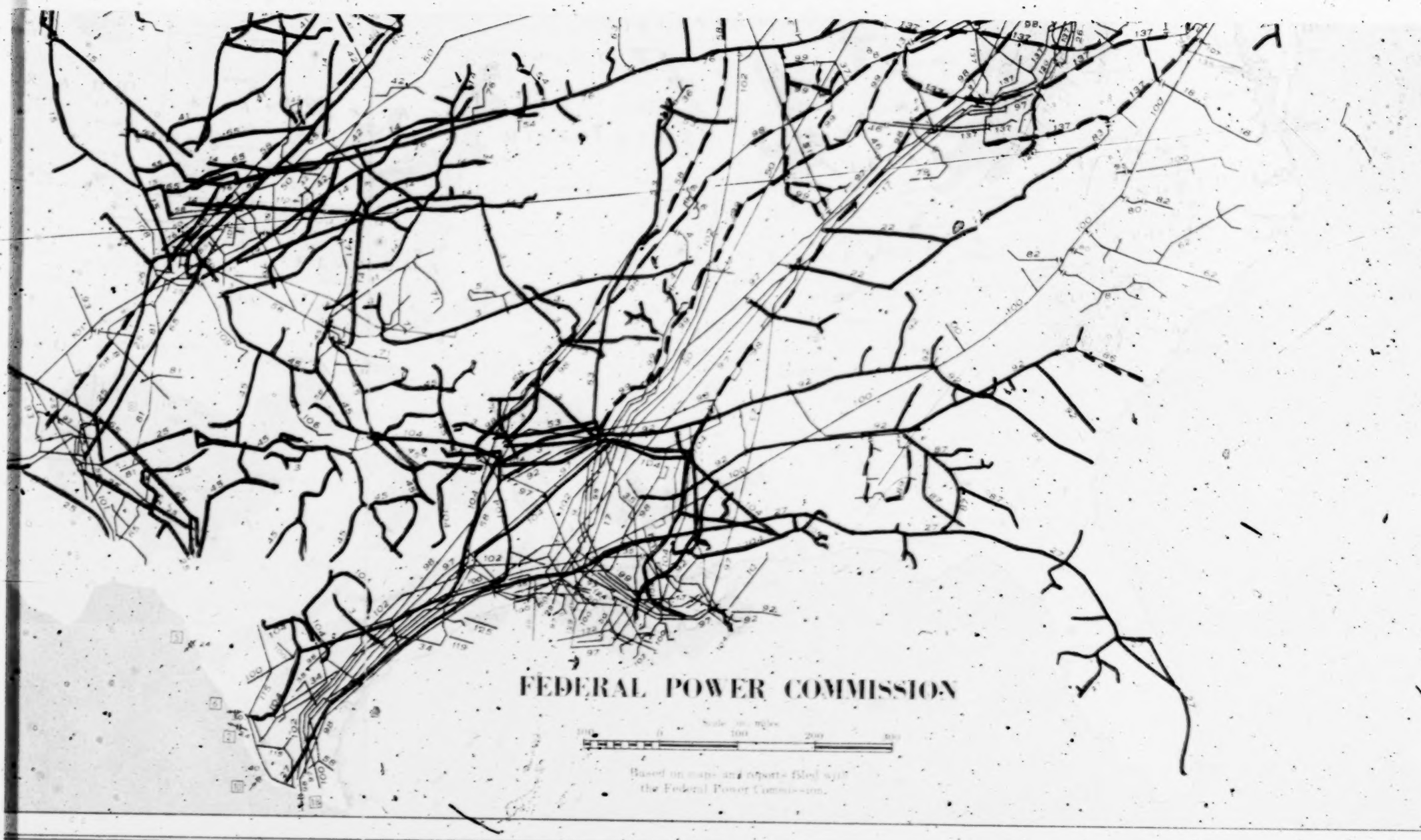
Existing

AJOR NATURAL GAS PIPELINES

APPENDIX I

AS OF JUNE 30, 1971

LEGEND
Pipelines
Existing
Making Direct Sales
Purchasing From Pipelines Making Direct Sales
46
Number refers to ownership list
Gas Fields
Area of Natural Gas Supply
FEDERAL POWER


FEDERAL POWER COMMISSION

Supreme Court, U.S.
FILED
FEB 14 1972
E. ROBERT SEAVER, CLERK

71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

UNITED GAS PIPE LINE CO. AND PENNZOIL UNITED, INC.,
Petitioners

v.

LOUISIANA POWER & LIGHT CO.,
Respondent

No.

UNITED GAS PIPE LINE CO.,
Petitioner

v.

LOUISIANA POWER & LIGHT CO., ET AL.,
(FPC Opinion 606)
Respondents

PETITION OF UNITED AND PENNZOIL FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(FPC Opinion 606)
Respondents

PETITION OF UNITED AND PENNZOIL FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United Gas Pipe Line Company (United) and Pennzoil United, Inc. (Pennzoil) petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit and for a writ of certiorari to review opinions and orders of the Federal Power Commission (Commission) prior to judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, at 1a) is not yet reported. The opinion of the District Court (App. C, *infra*, at 30a) is reported at 332 F.Supp. 692. The opinions and orders of the Commission (App. E, *infra*, at 55a) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, at 28a) was entered on January 14, 1972. The Commission Opinion Nos. 606 and 606-A (App. E., *infra*, at 55a) were issued on October 5, 1971 and December 3, 1971, respectively. Six proceedings to review those opinions are pending in the Court of Appeals;[1] United has filed timely motions to intervene in all six. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether, in times of shortage, the Federal Power Commission has authority under the Natural Gas Act to allocate the interstate gas supplies of an interstate pipeline as between industrial and domestic users.

2. Whether a court has jurisdiction to determine the Federal Power Commission's jurisdiction over facilities being operated by an interstate pipeline when the jurisdictional issue presented to the court is at that very time being litigated at the Commission.

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[1] The review proceedings are *Louisiana Power & Light Company, et al* v. *FPC*, No. 71-3429 (5th Cir., filed Dec. 3, 1971); *International Paper Company* v. *FPC*, No. 71-3531 (5th Cir., filed Dec. 15, 1971); *Gulf States Utilities Company* v. *FPC*, No. 71-3627 (5th Cir., filed Dec. 28, 1971); *Mississippi Power & Light Company* v. *FPC*, No. 72-1003 (5th Cir., filed Dec. 30, 1971); *Mississippi Valley Gas Co., et al* v. *FPC*, No. 72-1157 (5th Cir., filed January 21, 1972); *State of Louisiana et al* v. *FPC*, No. 72-1220 (5th Cir., filed January 28, 1972). Nos. 71-3429, 71-3531, 71-3627, and 72-1003 were consolidated by order of the Fifth Circuit entered January 28, 1972. The Commission's motion to consolidate these four review proceedings with Nos. 72-1157 and 72-1220 was served on February 1, 1972.

STATUTES INVOLVED

The statutory provisions involved (App. D, *infra*, at 43a) are Sections 1(b), 4, 5, 7, 16 and 19(b) of the Natural Gas Act, (the Act) as amended, 15 U.S.C. §§ 717(b), 717c 717d, 717f, 717o, 717r(b) (1970).[2]

STATEMENT

United, a jurisdictional pipeline,[3] (R. 266-67, 282)[4] operates interstate gas transmission facilities in Texas, Louisiana, Alabama, Mississippi and Florida, (RP71-29 Tr. 70)[5] and through connections with other major jurisdictional pipelines (R. 282) supplies much of the gas used in the eastern half of the United States.[6] All of United's sales, service and facilities, except some of those in its Victoria and New Orleans Divisions, have been certificated by the Commission pursuant to Section 7 of the Act. (R. 284) An application to certificate all of United's uncertificated sales, service and facilities is presently pending before the Commission in *United Gas Pipe Line Co.*, FPC Docket No. CP71-89.[7] (R. 284-85)

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[2] Act of June 21, 1938, 52 Stat. 821-24, 830-31.

[3] "Jurisdicational pipeline" as used in this application means a pipeline which is subject to the jurisdiction of the Commssion as a result of the transportation or sale for resale of natural gas in interstate commerce.

[4] "R." refers to the printed appendix filed in the Court of Appeals in connection with the appeal which resulted in the judgment (App. B, *infra* at ....) which United/Pennzoil ask this Court to review.

[5] "RP 71-29 Tr." refers to the certified record filed by the Commission in the review proceedings referred to in note 1, *supra*.

[6] RP71-29 Ex. 121; RP71-29 Tr. 3318-23, 3432-34, 5522-24, 5432-36.

[7] On February 9, 1972 the Commission found that all of United's uncertificated sales, service and facilities are subject to Commission jurisdiction. *United Gas Pipe Line Co.*, FPC Docket No. CP71-89 (Opinion No. 610, February 9, 1972). (App. F, *infra*, at 91a)

Curtailment Proceedings

Anticipating that it would not have enough gas available to meet the demands of all its customers during the 1970-71 heating season (November 1, 1970 through March 31, 1971), (R. 234) United, on October 26, 1970, by a filing under Section 4 of the Act, asked the Commission to issue a declaratory order concerning United's implementation of a system-wide[8] program of curtailments of natural gas deliveries to its direct and indirect[9] industrial customers. (R. 226) United's filing was docketed as *United Gas Pipe Line Co.*, FPC Docket No. RP71-29. On December 29, 1970, pursuant to agreement of all but one of the parties,[10] the Commission allowed United to continue to implement its plan for the 1970-71 winter. (R. 230)

On February 22, 1971, United made a supplemental filing (R. 231) regarding a proposed program of curtailment of industrial gas deliveries during the summer of 1971 in order to fill storage in anticipation of domestic demands during the 1971-72 winter heating season. In response to Commission Order 431, issued in FPC Docket R-418, United later filed a proposed curtailment plan for the 1971-72 winter. (R. 241-43)

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[8] The plan covered both United's certificated service and the service in the New Orleans and Victoria Divisions for which United has applied for certificates in Docket CP71-89.

[9] United's direct industrial customers include electrical utilities, to the extent they depend on United for gas to be burned as boiler fuel for the generation of electricity for industrial use. United's indirect industrial customers are industrial users who depend on United's pipeline customers or gas distribution customers for industrial gas.

[10] Monsanto Co. appealed the 1970-71 winter settlement order to the Court of Appeals for the District of Columbia Circuit. *Monsanto Co.* v. *FPC*, No. 71-1306 (D.C. Cir., filed April 26, 1971). Briefs have been filed; argument is scheduled for March 13, 1972.

District Court Proceedings

On March 31, 1971, while the Commission was conducting hearings in the curtailment proceeding, Louisiana Power & Light Company (LPL), one of United's industrial customers and a party to both the curtailment (R. 228-29) and certificate (R. 251) proceedings, filed a collateral attack on the Commission's jurisdiction. Basing jurisdiction in the District Court on 28 U.S.C. § 1332 because of diversity of citizenship, LPL claimed the curtailment program was a breach of its industrial contracts with United and asked for an injunction to prevent United from curtailing it. (R. 14)

Upon being confronted with motions by the Commission (R. 185) and United (R. 186) to dismiss for failure to exhaust its administrative remedies in the curtailment and certificate proceedings, LPL argued that exhaustion was not required because in its view, despite the Commission's jurisdiction over interstate gas transportation, the exemption of industrial sales from Commission rate regulation precluded the exercise of any Commission jurisdiction over admittedly interstate gas deliveries for direct industrial use. With respect to deliveries to its Nine Mile Point station it further argued that, under its view of the facts,[11] the gas in United's New Orleans Division, through which deliveries are made to Nine Mile Point, is local rather than interstate and that the Commission had no curtailment jurisdiction at Nine Mile Point for this additional reason.

On June 30, 1971, after an evidentiary hearing, (R. 223-403) the District Court dismissed the suit for lack of jurisdiction, holding that the Commission proceedings were well within the Commission's jurisdiction and that LPL was

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[11] The Commission ultimately found the facts to be substantially different from what LPL contended they were. (App. F, infra at 101a-08a)

required to exhaust its administrative remedies in both proceedings. (App. C, *infra*, at 39a-40a, 41a-42a)[12]

Judge Scott acknowledged the existence of a gas shortage, both nationally and on United's system, (App. C, *infra*, at 35a) and made the following findings of fact. Delivery of LPL's full contract volumes would reduce the supply of gas available to United's other customers and proportionately affect United's curtailment to those customers. (App. C, *infra*, at 40a) There are numerous customers not parties to this suit whose interests will be affected by the Commission curtailment proceedings. (App. C, *infra*, at 34a) The Commission approved United's curtailment program for the 1970-71 winter season with the agreement of LPL. (App. C, *infra*, at 35a) As of May 27, 1971, the time of the District Court hearing, the Commission was considering the propriety of United's curtailment program for the summer injection season (April 1, 1971 through October 31, 1971) and for the 1971-72 winter. (App. C, *infra*, at 35a-36a) LPL, subject to its objection to Commission jurisdiction, is a party to the consolidated curtailment proceedings. (App. C, *infra*, at 34a, 36a) The gas delivered at LPL's Sterlington station is interstate gas. (App. C, *infra*, at 33a) Interstate gas is commingled in the system through which deliveries are made to LPL's Nine Mile Point station. (App. C, *infra*, at 33a) and proceedings are currently pending before the Commission to certificate that system. (App. C, *infra*, at 33a)

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[12] This was the second dismissal for lack of jurisdiction. Also relying on the exhaustion doctrine, Judge Dawkins first dismissed the case on April 29, 1971. (R. 187-88) On May 14, 1971 an administrative panel of the Fifth Circuit vacated the judgment of dismissal and remanded the case to Judge Dawkins for an evidentiary hearing on the jurisdictional issue and on such other preliminary issues as might be properly raised. (R. 192-96) Judge Dawkins, at the request of LPL, then recused himself and the case was reassigned to Judge Scott.

Having found these facts, the District Court concluded (App. C, *infra*, at 39a-42a) that (1) the curtailment and certificate proceedings were well within the jurisdiction of the Commission, (2) LPL had failed to prove that it would suffer irreparable harm if required to pursue its administrative remedies and (3) the Commission's expertise was necessary for the proper consideration and disposition of the issues presented in those proceedings.

Court of Appeals Decision

On January 14, 1972, the Court of Appeals reversed. Rather than confining its review to the question of exhaustion of administrative remedies, the Court of Appeals undertook to decide the merits of the jurisdictional issue presented in the Commission curtailment proceeding and the additional jurisdictional issue presented in the certificate proceeding and held against the Commission on both issues. (App. A, *infra*, at 21a, 25a)

With respect to the issue of the Commission's jurisdiction presented in the curtailment case, which by the time of the Court of Appeals decision had been decided by Commission Opinion 606, (App. E, *infra*, at 55a) the Court of Appeals acknowledged the inability of state regulatory bodies to deal with systemwide shortages (App. A, *infra*, at 17a) but held that once a direct sale is certificated pursuant to Section 7 of the Act, it may not be further regulated short of a Commission abandonment order.

The Court of Appeals' holding that the Commission has no regulatory jurisdiction over United's New Orleans division was most unusual. On the basis of an incomplete record,[13] introduced before the District Court for the limited

[13] As of the time of the District Court hearing the CP71-89 record consisted of 43 pages of testimony and 15 exhibits. Formal hearings did not even begin until June 7, 1971, twelve days after the District Court hearing was concluded. When the CP71-89 record was closed at the Commission, it consisted of 1,276 pages of transcript, 63 exhibits and 10 items by reference.

purpose of showing the nature of the issue presented in the certificate proceedings, (R. 246-59, 260) it proceeded to make its own determination of factual issues which had never been passed upon by either the Commission or the District Court and concluded that the amount of interstate gas being commingled in that division on an annual basis was not large enough to subject the sales, service and facilities to Commission jurisdiction. (App. A, *infra*, at 25a) The District Court finding that the Commission's expertise was necessary for the proper consideration of these factual issues was disregarded. (App. A, *infra*, at 23a-24a)

REASONS FOR GRANTING THE WRIT

These cases present an issue of vital importance to the millions of individuals who depend on gas to heat their homes and to the institutions (schools, hospitals and other public facilities) who are equally dependent on this limited energy source. The queston is also critical to the regulated interstate pipelines, who transport the gas, and to the customers of those pipelines, who use the gas or sell it to the ultimate consumer. The issue, simply stated is, who will decide the service priorities when the supplies are not sufficient to meet the total demands of all.

The Fifth Circuit decision, which is in direct conflict with a District Court decision in another Circuit,[11] and which conflicts in principle with the decisions of this Court, deprives the Commission of jurisdiction over scarce supplies of admittedly interstate gas and at the same time leaves the industry without an orderly procedure for prorating the inadequate gas supplies of jurisdictional pipelines. Unless this Court expeditiously resolves the question, United may be required at any moment to follow the orders

[11] *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, Civ. No. 2253-71 (D.D.C., January 21, 1972); *Monsanto Co.* v. *United Gas Pipe Line Co.*, Civ. No. 2037-71 (D.D.C., January 21, 1972).

of various federal courts[15] to allocate its inadequate supplies in a manner at odds with the curtailment program sanctioned by the Commission, with the result that domestic users may well be short of gas before this winter is over, and the ability of interstate pipelines to store gas for anticipated domestic use during the 1972-73 winter heating season may be seriously jeopardized.

Because the Fifth Circuit judgment squarely decides the Commission's curtailment jurisdiction, despite the pendency of the review proceedings,[16] United petitions this Court to review both the judgement of the Fifth Circuit and the opinions and orders of the Commission prior to judgment of the Fifth Circuit.[17]

1. The judgment of the Fifth Circuit has a tremendous practical effect in the context of the undisputed gas shortage nationally and on United's system. By rejecting the Commission's determination (App. E, *infra*, at 59a) that it has the authority to allocate all interstate supplies on a system-wide basis among all customers, the Fifth Circuit has left it up to individual courts and state regulatory agencies to attempt to cope with the problem in the context of the varying provisions of numerous contracts between jurisdictional pipelines and their industrial customers.

The potential harm implicit in the Fifth Circuit judgment is demonstrated by the effect of the judgment on United's system operation as revealed by the record in the curtailment case.

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[15] *See* note 27, *infra*, and accompanying text.

[16] *See* note 1, *supra*.

[17] Pennzoil petitions this Court to review only the judgment of the Court of Appeals as it has not intervened in the review proceedings.

United estimated that on cold days it would be short by as much as 1.5 billion cubic feet. (RP71-29 Tr. 4107) Under United's plan a shortage of this magnitude would be dealt with by reducing direct and indirect[18] industrial deliveries (RP71-29 Ex. 123) Under the plan electrical utilities would be curtailed only to the extent that they use gas as boiler fuel for the generation of electricity for industrial use;[19] the ability of electrical utility customers like LPL to generate for domestic use is unimpaired by the plan. United's curtailment plan thus gives a higher priority to human needs than to industrial requirements, thereby taking into account the fact that large industrial users normally have the capacity to utilize alternate fuels when gas is not available whereas individual consumers normally do not have the ability to utilize alternate fuels. By curtailing industrials, United anticipated being able to avoid any curtailment of gas for domestic use this winter. (RP71-29 Tr. 4323)

Thirty seven per cent of United's total sales in 1970 were direct industrial sales. United FPC Form 2, at 514 (1970). The Fifth Circuit decision, by removing these substantial industrial volumes from Commission jurisdiction, has left them virtually unregulated and, has thereby left domestic users essentially without protection. For example, the Louisiana Public Service Commission is constitutionally prohibited from exercising any jurisdiction over any aspect of an industrial sale.[20] And no court or state commission,

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[18] *See* note 9, *supra*.

[19] *Ibid.*

[20] LA. CONST. art 6, § 4.

even if it had jurisdiction over industrial sales within its borders, would be in a position to regulate industrial curtailments on a system-wide basis. Accordingly if the Fifth Circuit decision stands, domestic users dependent on United's system could end up having to absorb the entire system shortage of 1.5 billion cubic feet on cold days the remainder of this winter, and United's ability to store gas for domestic use next winter will be seriously jeopardized.

2. The Fifth Circuit's restrictive view of the Commission's powers under the Act conflicts with the prior decisions of this Court which make clear that although Section 1(b) exempts direct sales from rate jurisdiction, it at the same time grants jurisdiction over all transportation of gas in interstate commerce and over natural gas companies engaged in such transportation. In *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947) and in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961), this Court, stating that the Act is to be broadly read in favor of federal regulation of problems with which state regulatory commissions cannot be expected to deal, recognized this independent grant of Commission transportation jurisdiction.

This Court has also clearly recognized the independent grant of Commission jurisdiction over natural gas companies engaged in interstate transportation[21] and has held

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[21] *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950).

that in the exercise of this natural gas company jurisdiction the Commission may proceed under the Act to prevent unjust, unreasonable or preferential rules, regulations, practices or contracts of jurisdictional pipelines.[22]

Curtailment jurisdiction is an exercise of jurisdiction over transportation and over the pipeline doing the transporting. The Commission has the power by virtue of its jurisdiction over transportation and over United to deal with United's curtailment plans by proceedings under Sections 4 and 5. By reading Section 1(b) as a whole, one is thus compelled to conclude that the Commission's curtailment jurisdiction is not inconsistent with the exemption of industrial sales from rate regulation. Nor is it limited by Section 7 as the Fifth Circuit suggests.

3. The Fifth Circuit's decision of the certificate proceeding, Docket CP71-89, presents an extremely important issue involving the adjustment of the relations between the federal agencies and the federal courts. The decisions of this Court, *e.g.*, *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173 (1962); *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, *rev'g mem.* 156 F.2d 821 (D.C. Cir. 1946); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), reflect a profound concern that the administrative process not be subverted by the substitution of a court's judgment for the judgment of an agency simply because of a claim of lack of agency jurisdiction. In *Marine Engineers* this Court made clear that the need for initial agency determination of its jurisdiction is greatest when the jurisdictional issue brought before the court is in the process of litigation at the agency. 370 U.S. at 185. Disregarding these decisions, the Fifth Circuit decided an important issue of Commission jurisdiction which was not before

[22] *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635 (1945).

it for review and which, although pending before the Commission in the certificate proceeding, had not then been decided by the Commission. In so doing the Fifth Circuit took an incomplete record[23] which was before it for the limited purpose of showing the nature of the issue which was pending at the Commission (R. 246-59, 260) and made factual determinations which had never been passed upon by either the Commission or the lower court. When one compares the Fifth Circuit's analysis of the facts, (App. A, *infra*, at 22a) with the subsequent Commission evaluation of a full record, (App. F, *infra*, at 101a-08a) one can quickly see why the decisions of this Court require that federal agencies be given the opportunity to make the initial determination of their jurisdiction.[24]

Additional evidence of the wisdom of allowing initial agency determination of questions of agency jurisdiction is demonstrated by the fact that in the process of evaluating the facts the Fifth Circuit also applied the wrong legal standard.[25]

Under the decisions of this Court, the Commission should have been given the initial opportunity to decide whether United's New Orleans division is subject to the Commission's jurisdiction and, if so, whether the sales, service and facilities in that division should be certificated under

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[23] *See* note 13, *supra*.

[24] The factual conclusions to be drawn from the evaluation of gas flow evidence are precisely the kind of determinations that, given the different institutional capacities of courts and agencies, should be reviewed only under the substantial evidence review procedure established by Section 19(b) of the Act. *Cf. Federal Power Commission* v. *Florida Power & Light Co.*, 40 U.S. L. Week 4141, at 4144 (January 12, 1972).

[25] When complicated questions of agency jurisdiction are litigated at the agency it is less likely that the reviewing court will be persuaded, as was the Fifth Circuit in this case, (App. A, *infra*, at 22a) to adopt theories like the *de minimis* concept discredited by this court in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 535-36 (1945).

Section 7 of the Act. Accordingly, the District Court decision requiring LPL to exhaust its remedies in the certificate proceeding was proper.[26]

4. Expeditious consideration of this important jurisdictional issue is imperative, as the potential impact on domestic users this winter is great and as the ability of jurisdictional pipelines to fill storage fields this summer in anticipation of the 1972-73 winter heating season demands is threatened. Two requests for injunctions are now pending in the D.C. Circuit,[27] and by virtue of the Fifth Circuit's refusal to stay the mandate in this case,[28] LPL will be entitled to go to trial on its injunction request in District Court. Other industrial customers of United, seeing the advantage LPL has obtained, will also seek injunctions, thereby seriously interfering with United's ability to protect domestic users the remainder of this winter and disrupting United's curtailment program this summer. Only prompt resolution of the jurisdictional issue by this Court can prevent these serious consequences.

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[26] The District Court requirement of exhaustion in the curtailment case was also proper at the time it was entered. However, as the Commission's opinions and orders (App. E, *infra*, at 55a) were pending in the Fifth Circuit at the time of the Fifth Circuit decision and as the Fifth Circuit has clearly rejected the rationale of the Commission's decision, the Commission's opinions and orders upholding its curtailment jurisdiction are properly before this Court for review. The certificate case on the other hand, although now decided by the Commission, (App. F, *infra*, at 91a) will not be ripe for review by any court until the rehearing procedure has been exhausted at the Commission. Accordingly the certificate proceeding may not be properly reviewed by this Court at this time.

[27] Texas Gulf Sulphur and Monsanto have moved for injunctions pending their appeals from the judgments, see note 14, *supra*, dismissing their injunction suits. *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, No. 72-1094 (D.C. Cir., request for injunction filed January 31, 1972); *Monsanto Co.* v. *United Gas Pipe Line Co.*, No. 72-1093 (D.C. Cir., request for injunction filed January 31, 1972).

[28] On February 1, 1972 the Commission and United/Pennzoil served motions requesting stay of the Fifth Circuit mandate. Stay was denied by order of the Fifth Circuit entered February 7, 1972.

CONCLUSION

For these reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Vice President and
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February 1972

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2550

LOUISIANA POWER & LIGHT COMPANY,

Plaintiff-Appellant,

VERSUS

UNITED GAS PIPE LINE COMPANY, ET AL.,

Defendants-Appellees,

FEDERAL POWER COMMISSION

Intervenor.

Appeal from the United States District Court for the Western District of Louisiana

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(January 14, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

CLARK, Circuit Judge: The present nationwide shortage of natural gas generated this controversy.[1] First, we must make a construction of the Natural Gas Act[2] which will properly balance that Act's grant of jurisdictional power to the Federal Power Commission (FPC) over the trans-

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[1] This is a matter we have judicially noticed as eminent; *See* Southern Louisiana Area Rate Cases v. Federal Power Commission, 428 F.2d 407 (5th Cir. 1970).

[2] 15 U.S.C.A. § 717-717w.

portation of natural gas in interstate commerce with the equally explicit Congressional directive that the Act shall not apply to so-called direct sales of gas — sales which are for consumptive use by the purchaser rather than for resale to others. This requires a determination of whether the grant of transportation jurisdiction confers a power to the FPC to now recondition certificates of public convenience and necessity it previously issued authorizing the construction and use of pipeline facilities to perform gas sales contracts between an interstate gas pipeline, United Gas Pipeline Company (United), and a utility company, Louisiana Power & Light Company (LP&L), which burns the contract gas under its boilers to generate electricity. Second, we must determine whether minor diversions of interstate gas have converted a wholly state-contained pipeline system to an interstate facility.

On preliminary motions by United and FPC, the district court dismissed LP&L's complaint seeking an injunction requiring United to perform its contracts. The dismissal was based both upon a finding that LP&L had failed to demonstrate irreparable injury and upon the legal conclusion that proceedings pending before the Federal Power Commission, concerned with the same general subject matter, were "well within the [primary] jurisdiction of the FPC." We determine that the lower court erred; both in basing its decision on LP&L's failure to demonstrate irreparable injury at a preliminary hearing on its opponents' motions to dismiss, and in concluding that the FPC's claim of continuing certificate jurisdiction and its claim of jurisdiction over an asserted intrastate facility was free from doubt. We therefore reverse the order of dismissal and remand this action for further fact development on the issue of irreparable injury.

BACKGROUND

In 1956 LP&L entered into a twenty-year contract with United calling for the delivery of natural gas to be burned under LP&L's boilers at its Sterlington Electric Generating Station in Ouachita Parish, Louisiana. The contract contained a provision entitled "Impairment of Deliveries" which provided that in the event a shortage of gas rendered United unable to supply the full requirements of all of its customers, then gas utilities reselling gas to domestic consumers and electric utilities using gas for the generation of electricity for domestic consumption would be first supplied by United, with any remaining available gas to be prorated among its other customers.

For many years United has also contracted with LP&L to sell it natural gas for LP&L's steam electric generating use at its Nine-Mile Point Generating Station in Jefferson Parish, Louisiana. This contract also contained an impairment of deliveries clause which provided that, in the event a shortage of gas made the available supply inadequate, available gas would be ratably prorated between gas utilities purchasing gas for resale to domestic consumers, and electric utilities using gas to generate electricity for domestic consumers.

Certificates of public convenience and necessity have been issued by the FPC covering all of United's facilities used to make deliveries to LP&L's Sterlington Station.[3] Deliveries to LP&L's Nine-Mile Point Station have never been certificated, since, until recently, all of the gas delivered to this station only traveled in a pipeline system, designated the "Green System," which gathered and dis-

[3] United Gas Pipe Line Co., 3 FPC 863 (1942); United Gas Pipe Line Co., 19 FPC 31 (1957), United Gas Pipe Line Co., 33 FPC 734 (1965), United Gas Pipe Line Co., 37 FPC 399 (1967), United Gas Pipe Line Co., 38 FPC 88 (1967).

posed of gas wholly within the confines of the State of Louisiana. However, in 1970 United chose to divert 2.6% of the gas supplied under its Nine-Mile Station contract into the Green System from its interstate system, designated the "Black System."

In 1970 United petitioned FPC for declaratory approval of a curtailment plan to meet an anticipated shortage of gas during the 1970-71 winter heating season and for an indeterminate time thereafter.[4] LP&L and other direct sales customers of United intervened. In its petition for intervention, LP&L maintained that the proposed curtailment program reached both direct sale and sale for resale customers and would violate the terms in its contracts. LP&L denied that the FPC had jurisdiction to curtail direct sales contract deliveries through previously certificated transportation facilities.

United has also filed an application with the FPC to grant a certificate of public convenience and necessity to utilize the Green System pipeline facilities serving the Nine-Mile Point Station of LP&L. This proceeding bears Docket No. CP 71-89. LP&L has intervened. No decision has been rendered.

In March 1971, LP&L filed a complaint in the district court asserting jurisdiction based on diversity of citizenship. It sought and received a temporary restraining order requiring United to perform its contracts. The day following the issuance of this order, the FPC intervened in the case and the district court reversed its prior restraining order and dismissed the cause for lack of jurisdiction. After the district court refused to stay its order of dismissal a single judge and, subsequently, a panel of this Circuit, stayed the dismissal of the district court action and entered an order providing in pertinent part:

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[4] Docket No. RP 71-29.

> The case is remanded to the district court for an expedited hearing on the jurisdictional issue and on such other *preliminary* issues as may properly be raised. This Court expresses no opinion on the jurisdictional issue. At such hearing counsel for the parties and the intervenor may present evidence hearing on the jurisdiction of the court and on other appropriate *preliminary* questions. The district court will make appropriate findings of fact and state its conclusions of law. (Emphasis supplied.)

We add emphasis to the above quotation to point up that we did not direct that the court hear the case on its merits at the time it held the required jurisdictional hearing.

On remand, the district court held the hearing mandated and made Findings of Fact which included the following:

> All gas delivered by United to the Sterlington and Nine-Mile Point Stations is produced in Louisiana. All deliveries of gas to the Sterlington Station are interstate gas. Deliveries of gas to the Nine-Mile Station are made through the "Green" pipeline which is located entirely within the State of Louisiana. The great bulk of the gas in the "Green" line is intrastate gas. However, some gas is dumped into the "Green" pipeline from the "Black" pipeline. This is interstate gas so there is a co-mingling of intrastate and interstate gas in the "Green" pipeline.
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> * * *
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> LPL has alleged (Complaint Paragraph 17) that the proposed curtailment by United could ultimately effect a "black-out" or "brown-out" which, under certain circumstances, could cover an area as large as the whole State of Louisiana, or, indeed, a several-state area such

as occured during the notorious "northeast black-out" in 1965. The record is bare of any evidence to support this allegation.

The court additionally noted that LP&L has filed a registration statement with the Securities & Exchange Commission which not only did not disclose the pendency of the subject litigation as a suit which carried the potential of severe service interruptions, but also affirmatively stated that after June 1971 it expected to be able to offset any foreseeable gas curtailment by burning oil at its generating stations.

The Court concluded as a matter of law that the motions to dismiss filed by United and FPC should be granted because LP&L had failed to establish irreparable injury and therefore was not entitled to injunctive relief. It alternatively based its dismissal upon the conclusion that LP&L was required to exhaust its remedies before the FPC rather than pursuing judicial relief since: (1) LP&L had not proved the extent of possible injury which might result from the pursuit of curtailment proceedings before FPC; (2) those curtailment proceedings were well within the jurisdiction of the FPC; and (3) the expertise of the FPC was necessary for the proper consideration and disposition of the issues. All injunctive relief was vacated and the action brought by LP&L was dismissed. The present appeal arises from this action.

During the pendency of this appeal, the FPC rendered its Opinion No. 606 in United's curtailment proceedings, Docket No. RP-71-29. In this opinion the Commission concluded that it had plenary authority to allocate the gas supply of jurisdictional pipelines to *all* of the pipeline's customers, including customers who were previously certificated direct sale purchasers under long-term contracts, and

that it should make such allocations in the form of tariff orders requiring curtailments of gas deliveries to all users of natural gas which United transported in commerce. The basis of the FPC's reasoning was that its power to make such curtailments was related to its jurisdiction over transportation, and that its transportation jurisdiction "is and must be" of a *continuing* nature rather than being "insignificantly" limited to the initial grant or denial of a certificate of public convenience and necessity to construct the facilities used to make direct sales. The FPC determined that it must have jurisdiction to exert continuing control over the gas sold under such certificated direct sales in order to accord full protection to the public since state commissions could not reasonably be expected to formulate a uniformly fair plan for the apportionment of the scarce commodity. Thus, FPC asserts that the present gas shortage has created "new circumstances" giving rise to the "need" to continuously reevaluate previous certificates to make all pipeline sales fully compensatory and thereby use financial incentive to encourage exploration for and development of new natural gas supplies.

PROOF OF IRREPARABLE INJURY

Both premises for the court's jurisdictional dismissal were based (one in whole and the other in part) on the determination that LP&L had failed to carry the burden of demonstrating its potential injury. In its sworn complaint in the district court, LP&L detailed its assertions of immediate and irreparable damage. In brief paraphrase, its allegations were these. LP&L supplied the electricity it generated to 46 of 64 parishes in Louisiana and had interconnections with all other electrical utility companies in Louisiana and most of the rural electric cooperatives in that State. Through this network it served the electrical needs of numerous domestic and industrial customers, as well as governmental subdivisions. Through other intercon-

nections, it participated in an area-wide electrical grid network serving over 2,500,000 consumers, which was still further connected to power sources throughout most of the eastern part of the nation. A failure to be able to utilize the full generating capacity of the Sterlington and Nine-Mile Stations at peak demand periods could cause a wide area "black-out" or "brown-out" with damages beyond any means of calculation. It was further asserted that LP&L had relied upon United's contract when it constructed Sterlington Station, which had no full-capacity alternate source of energy for electrical generation and that, so long as United breached its contract commitment by curtailing gas deliveries, LP&L would lose electrical sales which could never be recovered because of the evanescent quality of its stock in-trade, electricity, which could not be stored nor could it be delivered at any moment after the immediate demand for it had passed. The loss of such sales would be further irreparable since the fixed cost of basic generating facilities depreciated whether used or not.

The court found that the record on the preliminary hearing of the motions to dismiss for want of subject matter jurisdiction, under Fed.R.Civ.P. 12(d) was bare of any evidence to support the portion of these allegations relating to a possible "black-out" or "brown-out" of electrical power. This finding is correct; just as it is further true that the record is devoid of any evidence to support the remaining verified allegations of irreparable injury through lost sales. But, it is obvious why. At the commencement of the hearing[a] and in ruling on objections during its progress, the court made it abundantly clear that all evidence to be taken should be directed solely to the jurisdictional issue raised by the respective motions to dismiss of United and

[a] The hearing commenced with the court's announcement to *United's* counsel: "— you are the mover, so you may proceed."

FPC. Neither the defendant nor the intervenor had answered. No responsive pleadings other than these jurisdictional motions were on file. The case was not then being heard on its merits (or lack of them) as to the ultimate relief prayed for by the plaintiff.

The basic tenet of both prongs of the lower court's ruling — that LP&L had failed to demonstrate it would be harmed by any curtailment of gas deliveries under United's contract — was drawn from the examination and cross-examinations of J. M. Wyatt, a senior vice president of LP&L. On direct examination, Mr. Wyatt testified that at the time of this Rule 12(d) hearing, the Sterlington Station plant had no capability to utilize any alternate fuel other than natural gas and that the Nine-Mile Point Station was equipped to operate only one of its several units, and that unit only on an emergency basis for up to 36 hours, on No. 2 fuel oil. He further testified that after June of 1971 the company expected to have similar emergency capability to operate one unit of its Sterlington plant on such fuel oil. On cross-examination of Mr. Wyatt, counsel for the FPC brought out that registration statements filed by LP&L with the Securities and Exchange Commission contained assertions under the heading "Fuel Supply" which were inconsistent with the anticipated injuries which the complaint asserted would flow from the breach of United's contracts. Counsel for United brought out on his cross-examination of Mr. Wyatt, that LP&L had a separate natural gas supply contract term supply of 66⅔% of the present fuel energy requirement for the operation of LP&L's Nine-Mile Point station, and that another LP&L-Texaco, Inc. gas contract had been made to cover additional fuel when a new generating unit went on stream at this plant in 1973.

After an examination of the entire record, this Court concludes that the preliminary hearing record compiled in

the court below was limited to a determination of the jurisdiction of the court vis-a-vis the jurisdiction of the FPC. The hearing had a somewhat unique procedural posture due to this Court's stay and remand for expedited disposition of the jurisdictional issue. This factor aids in making it abundantly clear that the court and the parties were proceeding on the assumption that the matter was being heard on defenses as to which the movants and not LP&L had the burden of persuasion.

This is not to say that a party moving for an injunction does not have the burden of showing irreparable injury. We only assert that the mandate of this Court remanded the cause to the district court for an expedited hearing on the jurisdictional issue and on other *preliminary* issues that were appropriate or properly raised. With no pleading challenge whatsoever to the facts stated in the complaint, and without notice of any kind to the parties that the matter was to be heard on its merits, the court improperly based its conclusions of law upon its finding of a failure by LP&L to carry a burden it did not know it was required to meet. *Cf. Nationwide Amusements v. Nattin*, ... F.2d ..... (5th Cir. 1971) [No. 71-2299, 1971].

Finally, as to the procedural aspect of this matter, we hold that it was error to use the preliminary hearing proceedings on Rule 12(b) defenses to dispose of this cause on its underlying factual merits. Except in unusual circumstances, and then only after clear notice this course is improper. *See* 5 Wright and Miller, Federal Practice and Procedure § 1373; 2A J. Moore, Federal Practice ¶12.16.

Aside from the procedural problem, the lack-of-proof-of-potential-injury bases for denial of injunctive relief and for requiring exhaustion of FPC remedies cannot stand on the undisputed matters which were developed. The fact that LP&L made statements to the Securities & Exchange Com-

mission which can be read to be inconsistent with its claim that performance of United's natural gas contracts is an essential prerequisite to the operation of its plants, is a matter that could be considered if the defense of estoppel is raised or the equitable defense of unclean hands should become pertinent.[6] All we hold on this appeal is that the language of the filing posed against the sworn facts of the complaint and Wyatt's testimony would, at most, show that LP&L was guilty of misleading the investing public. If that be so, it is another lawsuit. There was no room for concluding from any fact shown in this record that LP&L had some alternate means of generating electricity except on a makeshift basis, or even on that basis, for more than a day and a half.

Of course, proof of this type could be critical if proven facts left room for conflicting inferences as to whether loss of contract gas would indeed result in injury. The Nine-Mile Point Station contract arrangement with Texaco, Inc. would similarly present a substantial question in this respect. It apparently shows the ability to obtain 2/3rds of the needed supply of natural gas for this particular station for the next two years, and an even greater percentage of its needs for those years after the additional generating unit becomes operational.

What all of this may mean as to the relationship which the amount of gas contracted to be supplied to the Sterlington and Nine-Mile Point Stations by United bears to LP&L's ability and imperative need to generate electricity both

[6] Before this court, LP&L asserts that its registration statements do not even demonstrate a lack of candor with the Securities & Exchange Commission, since LP&L was entitled to assume that its contract commitment with United would ultimately be honored. However, we expressly eschew *any* hint of a ruling on this matter. It is no more pertinent to our review than it was to the preliminary decision below.

to prevent catastrophic breakdown and irretrievable loss of sales, can only be determined by development of the evidence on the merits. What is the fuel need at each station? What are the alternate sources of energy supply? How much power can be exchanged (and at what ultimate loss or gain to LP&L) through interconnected sources? What are LP&L's usual and the peak demands? The record does not answer any of these questions, or the doubtless many more, that will play into arriving at the final answer.

In sum, we hold the district court erred in finding and concluding upon this record that LP&L had failed to establish that the breach of these contracts would not cause it immediate and irreparable injury, both because it improperly assigned the burden of proof to LP&L at this stage of the proceeding and because the record does not demonstrate that such injury is not likely to occur.

FPC JURISDICTION

The Direct Sales Exclusion vis-a-vis Continuing Certificate Jurisdiction (The Sterlington Station Issue).:

The intent which motivated Congress at the time legislation was enacted must be the lode star constantly guiding the court which is required to construe their enactment. At first blush, it may seem trite to start this draft of the chart of our search for statutory meaning with so basic an axiom. But the changed circumstances of a new era are claimed in the strongest terms to have created an urgent *"need"* for the recognition of an authority to extend a granted power so deeply into an area where agency jurisdiction was expressly denied that, to paraphrase an old song, accentuating the affirmative eliminates the negative. This we cannot do. Such action does not fill in statutory interstices or resolve ambiguities in a law. It selects between competing policies which have been legislatively recognized in the same enactment and have been court-de-

cleared not only to be separate subjects of regulation, but also to have "independent and equally important places in the Act." *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed.268 *reh. denied* 339 U.S. 905 (1950).[7] Such choices of policy belong to the Congress alone. In speaking to the effect of new experiences under this very Act and to the identical problem we face, the Supreme Court plainly specified that *Congress* was the institution vested with the power to adjust the law to correct deficiencies which were not originally anticipated. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 522, 68 S.Ct. 190, 92 L.Ed. 128 (1947).

With our compass oriented to legislative intent, we turn to the Act itself and the authorities which have construed it to date. In the *Panhandle Eastern* decision cited above, the Court, while recognizing the undoubted power of Congress to define the distribution of power over interstate commerce, pointed out that the Natural Gas Act created an articulate legislative program creating a comprehensive regulatory scheme in which federal power complemented, but did not usurp, the existing authority of state regulatory agencies, 332 U.S. at 520. Congress was motivated by a desire to protect consumers against exploitation at the hands of natural gas customers, *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 147, 80 S.Ct. 1392, 4 L.Ed.2d 1623 (1960), but it did not decide that this protection was to be accomplished by arrogating all control over

[7] Subsequent circuit decisions have articulated this principle by stating that while the FPC's power over transportation invests it with limited indirect control over non-jurisdictional direct sales, the grant of power and the reservation of such sales are separate aspects of regulation under the Act. *See e.g.*, United Gas Pipe Line Co. v. Federal Power Commission, 388 F.2d 385 (5th Cir. 1968); Panhandle Eastern Pipe Line Company v. Federal Power Commission, 359 F.2d 675 (8th Cir. 1966).

interstate commerce in natural gas to the federal agency. "[M]uch authority was reserved to the States." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 19, 81 S.Ct. 435, 5 L.Ed.2d 377 (1961). Since a complete as well as an harmonious regulatory scheme was envisaged, an intent to leave no area of substance unregulated must also be recognized, and no "attractive gaps" should be created by judicial interpretation. *Id.* However, as Mr. Justice Black wrote in *East Ohio Gas Co.*, supra, the location and breadth of such "gaps" must be adjudged in the light of what rights were defined by court precedents which existed *prior* to the time of legislation and not those since decided or which the courts would decide today. Without such a limit, judicial action would certainly become legislation.

The coverage of the Natural Gas Act has been so succinctly and aptly described by Mr. Justice Rutledge that it would be presumptuous not to quote:

> Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.
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> The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply to *any other* * * * *sale* * * *." (Emphasis added.) Those words plainly mean that the Act shall not apply to any sales other than sales "for resale for ultimate public consumption for domestic,

> commercial, industrial, or any other use." Direct sales for consumptive use of whatever sort were excluded.
>
> The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise.[8]

As is not uncommon when courts construe legislation over any appreciable time, subsequent decisions have made the clear "line of the statute" more and more crepuscular. One thing can be sharply discerned, the explicit prohibition of the statute denying jurisdiction over direct sales of gas for consumptive use has been consistently narrowed as courts and the FPC have increased the ambit of the jurisdictional grant over interstate transportation of such fuel. This has been done by analyses which recognized broad power in the FPC to grant certificates of public convenience and necessity in connection with extension of pipeline facilities to service direct sales outlets.

The most significant decision construing the FPC's certificate jurisdiction is *FPC* v. *Transcontinental Gas Pipe Line Corp., supra,* which was decided after Congress had amended § 7 of the Act to greatly broaden the ambit of federal power. That case pointed out that in the original Act, § 7[9] restricted certification to instances where a pipeline sought to serve an area already being served by another regulated company. In 1942 § 7 took its present form requiring certifi-

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[8] Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana, *supra,* 322 U.S. at 516.

[9] 15 U.S.C.A. §717(f).

cation of every facility subject to the jurisdiction of the Commission. The amendment intended to change the certificate function, which formerly looked only to control of competition between regulated pipeline companies, to one which considered both relative end use values and price effect factors.

This extension of the certificate function obviously detracted from the direct sale exclusion, but in *Transcontinental*, the Court affirmed that direct sales remained ". . . not subject to the Commission's jurisdiction *except insofar as § 7 requires the Commission to certificate the transportation of gas pursuant to the sale.*" (Emphasis supplied.) Furthermore, in this same opinion, Chief Justice Warren avowed that § 7 powers of the FPC were limited. He observed that the Commission had sought but had not been awarded comprehensive authority over all aspects of gas conservation. His description of the power which Congress had been willing to confer on FPC was the right to exercise a *veto power* over proposed transportation. 365 U.S. at 17.

Against this background matrix of interpretive instruction, we must decide whether a new form of certificate jurisdiction never heretofore judicially recognized exists under § 7. The issue is: Does the FPC have the authority to modify or condition a certificate of public convenience and necessity issued for facilities used to make a direct sale? Or more briefly stated: Does the Commission have continuing certificate jurisdiction? FPC asserts that it does, and that it *"needs"* to have this jurisdiction to make effective what it conceives to be the full extent of its regulatory powers. We deny this assertion. Even conceding that FPC powers are as broad as it asserts, no amount of need alone can create federal agency power if Congress has not expressly or impliedly granted it. Necessity may be the mother of inven-

tion, but need must have the paternal spouse — a legislative grant — to beget agency authority.

The grant of a continuing jurisdiction over certificates already issued might well be implied from the broad powers vested over transportation under § 7. The *Transcontinental* case teaches that FPC has the power to weigh and consider the end uses of gas in order to maintain the greatest benefit from the finite supply of this wasting natural resource. It is further empowered to consider the overall effect which prices to be paid by direct sale purchasers will have on field prices for jurisdictional uses. Such far-reaching powers clearly indicate that episodic State regulation could result in less efficient control than would centralization of all control in the FPC. Considered on these factors alone, the basic rules of statutory interpretation would call for a construction favoring continuing certificate jurisdiction. But! The Act itself expressly proscribes jurisdiction over direct sales and, as to such transactions, the recognition of continuing certificate jurisdiction would do no less than abolish the Act's exception of jurisdiction over sales for consumptive use, which has an equally secure and important place in the structure of the Act.

When any initial certification proceeding is pending before it, even one involving a direct sale, the Commission can exercise a *veto power* over the proposed transaction based upon its judgment as to whether the use proposed to be made is for a valid and efficient use, and whether the price structure would have a deleterious effect in consideration of its overall regulatory scheme. However, as to a non-jurisdictional sale, this power ceases under the Act as it is presently written when the certificate is finally issued, unless and until the right to abandon certificated facilities is requested.

Not only do we fail to find any precedent for establishing a new type of FPC authority in between its § 7 (c)[10] veto power over the initial authorization to begin the use of a facility to transport natural gas in interstate commerce and § 7 (b)'s[11] requirement that FPC authorization be obtained for abandonment of such facilities,[12] we find clear authority that no such continuing control over non-jurisdictional sales exists. The rationale of our own decision in *Hunt Oil Company* v. *Federal Power Commission*, 334 F.2d 474 (5th Cir. 1964), indicates that a certificate has a permanency that is free from continuous FPC adjustment and control. In that case when we determined that the FPC had erred in refusing to permit a state public service commission to intervene in a proceeding which had resulted in the issuance of a certificate of public convenience and necessity, we not only authorized such intervention but required the FPC to set the certificate aside and start the proceedings anew. If there

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[10] In pertinent part, this section provides:

> (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefore, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: . . . ."

[11] (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

[12] *See* United Gas Pipe Line Company v. Federal Power Commission, 385 U.S. 83, 87 S.Ct. 265, 17 L.Ed.2d 181 (1966).

was a continuing revisory power in the Commission, the vacation of the certificate would have been unnecessary since the intervenor's rights could have been accommodated by adjusting the certificate.

Even stronger authority is found in the precedents from other circuits. In *Granite City Steel Company* v. *Federal Power Commission*, 320 F.2d 711 (D.C. Cir. 1963), that court set aside an FPC order attempting to reallocate gas supplies between direct and resale sale customers. Although this proceeding relied on the proscription of §7(a) forbidding the FPC to compel a natural gas company to sell gas when such a sale would impair the company's ability to adequately serve existing customers, it is squarely based on the premise that, absent any § 7(b) issue of abandonment, a certificated direct sale cannot be indirectly controlled by the FPC. It is also worthy of note that the court observed that matters occurring after the Commission enters an order cannot be used to retroactively validate that order. Certainly the converse is equally logical — matters occurring after the issuance of a certificate cannot be used to invalidate the certificate, unless the Act confers a source of continuing authority to revise and amend that certificate. In *Colorado Interstate Gas Company* v. *Federal Power Commission*, 185 F.2d 357 (3rd Cir. 1950), the court quoted the identical language from the Supreme Court's opinion in *Panhandle Eastern Pipe Line Co.*, *supra*, that we quoted above and then stated:

> 'Nothing need be added to this clear statement of the coverage of the act. When applied to the problem before us it means that the power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress has conferred upon the Commission that body is without auth-

> ority to compel Colorado Interstate to make its gas tariff applicable to any sales other than those for resale. It is beyond the power of the Commission to require a natural gas company within its jurisdiction to make its tariff applicable to sales which are not within the regulatory power of the Commission for this would be in effect to regulate such sales.

Yet this is precisely what the Commission has undertaken to do in the situation at bar. Its opinion No. 606 requires United to file a plan for the curtailment of direct sales, including those made to LP&L under these contracts in the form of new and amended tariff sheets. *See also City of Hastings, Nebraska* v. *Federal Power Commission*, 221 F.2d 31 (D.C. Cir. 1954).

Panhandle Eastern Pipe Line Co. v. *FPC*, 232 F.2d 467 (3rd Cir. 1956) is not to the contrary. In that case the Federal Power Commission had granted a pipeline company *conditional* certificates and, before the certificates were made final it required the company to file tariffs which contained interruptible priorities for excess gas. After this requirement was made by FPC, the pipeline company acquired new direct sales customers to absorb its excess gas supply and thereby attempted to circumvent the restriction. The Court refused to allow this negation of the FPC's requirement. This case turned upon the recognized jurisdiction vested in the Commission to consider end use and price factors in determining *initial* permanent certification, and not upon any recognition of a right of continuing certificate jurisdiction. The court distinguished rather than overruling or modifying its prior opinion in *Colorado Interstate Gas Company, supra.*

We also distinguish the 6th Circuit's 1949 decisions denying specific performance in one instance and injunctive relief in another as to disputes between a pipeline company

and a purchaser of natural gas for resale. *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784, and *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942. Authority over the interstate gas sale of a pipeline company and a purchaser for resale which was sought to be court-litigated, was clearly vested in the FPC. That is not the case here.

The Commission contends that the provisions of § 4 (b),[13] which prohibit regulated pipeline companies from granting undue preferences respecting transportation of gas subject to the Act, when coupled with § 5(a),[14] authorizing FPC elimination of such practices, grant the authority to exercise continuing supervisory authority over all aspects of certificated direct sales transactions. This contention is but another form of the proposition advanced under § 7 which we have dealt with above. Carried as far as the FPC urges, it would bring the agency's transportation authority into irreconcilable conflict with the Act's equally viable express direct sale reservation.

Summarizing, we hold that the FPC has no form of continuing certificate jurisdiction over direct sales to cus-

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[13] "No natural-gas Company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. 15 USCA 717c(b).

[14] "Whenever the Commission . . . shall find . . . that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."
15 USCA 717d(a).

tomers of interstate pipeline companies. It has the initial right to issue or veto a certificate of public convenience and necessity and it must give its approval to the abandonment of the use of the certificated facilities, but between the two functions the express exemption of regulatory power over such consumptive sales bars agency intervention.

Has the "Green System" Become Interstate? (The Nine-Mile Station Issue.)

There is no dispute in the record as to any fact bearing on this point.

All of the gas moving to the Nine-Mile Point Generating Station is delivered through the Green pipeline system, which is located entirely within the State of Louisiana. All gas consumed at the station is produced in Louisiana. During 1970 United chose to fulfill 2.6% of its contract commitment with gas which was flowed a portion of its way from certain Louisiana wells to a valve connection to the Green system, through United's Black (interstate) pipeline system. It is particularly significant that this minor amount of interstate gas had been introduced *into* the Green system, and that no intrastate gas could flow *from* the Green system into the Black system because of the pressure differential between the systems. Although a physical connection permits the Black to Green flow, the two systems are otherwise entirely separate facilities. Approximately 4,000,000 Mcf units of gas were added to the Green system from the Black system in 1970 out of a total of more than 155,000,000 Mcf units which were delivered by the Green system that year. Through an affiliate, United controlled gas wells in Louisiana (which wells were equipped to deliver fuel to both the Black and Green systems, but in fact delivered only to the Black system) that produced more than the entire amount of gas diverted from the Black system into the Green system in 1970.

United and the FPC rely upon this circuit's holding in *Louisiana Public Service Commission* v. *FPC*, 359 F.2d 525 (5th Cir. 1966), commonly called the Florida Parishes case to show the Green system must now be certificated. LP&L argues that since United had within its control the power to meet its obligations to Green system customers using only intrastate gas, the fact that it chose at times to co-mingle a small amount of otherwise intrastate gas with interstate gas and then redeliver it to the Green system, distinguishes the Florida Parishes situation and gives United no basis for seeking to transfer the Green system from Louisiana to federal control.

In determining whether a particular gas delivery system is subject to federal regulation neither contract stipulations nor other conventions or legal fictions control. The court must examine "the anatomy of the pipeline system to discover the channel of constant flow" to see if, in fact, gas crosses a state line at any stage of its movement from wellhead to ultimate consumption. If it does, it is interstate gas. *People of the State of Calif.* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486, 13 L.Ed.2d 357 (1965); *FPC* v. *Amarada Petroleum Corp.*, 379 U.S. 687, 85 S.Ct. 632, 13 L.Ed.2d 605, *reh. denied* 380 U.S. 959, 989, 85 S.Ct. 1081, 1327, 13 L.Ed.2d 976, 14 L.Ed.2d 283 (1965).

The lower court held that this analysis of constant flow required agency expertise and that it should refuse to exercise its jurisdiction and require exhaustion of administrative remedies. Without adopting any sweeping or dogmatic contrary rule for every imaginable case, we disagree in the case at bar. The solution to the legal problem here depends upon simple flow mechanics, which are demonstrated in this record by uncontradicted evidence. It requires no expertise to determine that the channel of constant flow, insofar as the gas passed through and consumed from

the Green system is concerned, is essentially within the State of Louisiana. There is no attempt here to clothe interstate gas with an intrastrate or non-jurisdictional sale character by contract language as was present in the *Lo-Vaca* and *Amarada* cases, *supra*. The intrastate character of this sale is based on substance — the physical movement of gas — not on any formalism or technicality.

The Florida Parishes case is equally factually distinguishable. There, gas from Louisiana wells was collected and delivered into large high-pressure gas transmissions mains which transported substantial volumes of gas in interstate commerce to points in Mississippi and Alabama. Lateral connections from these main pipelines were used to serve towns in Louisiana. The court described the lines as "part of a fully integrated system by means of which United transports and sells gas from the states of Texas, Louisiana and Mississippi to industrial customers, pipeline's and local distributors in those states and in Alabama and Florida." An analysis of the anatomy of constant flow in the single system which served these towns demonstrated that gas had to move through interstate facilities to reach them. They did not receive their gas through a distinct and geographically localized system such as the Green system here.[15] The *Amarada* case also is physically distinct. Although more of the gas which the contracts there attempted to classify as intrastate actually flowed in interstate commerce in the summer months, a substantial volume flowed in the winter months also. Thus, analysis showed a constancy of interstate movement. The *Lo-Vaca* case presented an attempt to contractually formalize two gas sales which

[15] In fact, our Florida Parishes opinion was careful to point out: "the question under consideration has no relation to United's purely intrastate pipeline facilities which are completely separate from its interstate system and over which the commission has not asserted jurisdiction."

moved through an interstate pipeline as direct sales and therefore exempt from regulation. The Court disregarded the contract language and looked to see, not only that these sales were only a portion of the volume of interstate gas moving in a single system, but also that a portion of this gas was in fact resold outside of the state where it was produced.

In contra-distinction to each of these cases, the flow of gas from the Black system into the Green system in the case at bar is occasional and irregular, as well as minimal. The Green system, as an entire and separate unit, is physically located in and functions entirely in Louisiana. Therefore, the undisputed facts show that the channel of constant flow is an intrastate and not an interstate channel. The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction.[16]

Do FPC Proceedings Bar Court Relief?

Both United and the FPC contend that the curtailment proceedings in Docket No. RP 71-29 and the certificate proceedings in Docket No. CP 71-89 are within the jurisdiction of the FPC and that the court was correct in dismissing the present action. All parties cite numerous precedents, most from the Supreme Court. An attempt at rationalization would needlessly lengthen this opinion. The

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[16] LP&L has urged that the clearly erroneous review standard of Fed.R.Civ.P. 52(b) must be applied here. We note, however, our ruling does not involve any disagreement with facts found by the district court. We only differ with the interpretation he places on undisputed evidence. Such interpretations are reviewable "free from the restraining impact of the so-called 'clearly erroneous' rule." See B & M Company v. United States ..... F.2d ..... (5th Cir. 1971). [71-1320 December 1, 1971]

entire area has been thoroughly analyzed by a leading text in the field. It collects and discusses most of the authorities relied on by both sides. It was relied upon by the court below and we rely upon it here. *See* 3 K. Davis, Administrative Law Treatise §§ 20.01 through 20.03.

Because we hold the lower court erred in its holding regarding potential injury and in its views as to primacy of agency jurisdiction, we arrive at a different result in applying Professor Davis' three-part test (§ 20.03).

See Bailey v. *United States*, ... F.2d ..... (5th Cir. 1971) [No. 71-1731, December 8, 1971], and *cf. United States* v. *Hernandez*, ... F.2d ..... (5th Cir. 1971) [No. 71-1656, December 27, 1971].

Is This Appeal Moot?

United also urges that the rendition of the FPC's opinion No. 606 has rendered the present action moot. We disagree. That opinion is subject to court review under § 19 of the Act.[17] An appeal has been taken by LP&L to this court from Opinion No. 606 and is now pending as Cause No. 71-3429. Thus, there is an unusual confluence of reviews in this court in the matter *subjudice*. However, until affirmance upon the completion of court review, FPC Opinion No. 606 is not a final determination of the issues presented. It would be a strange, Frankenstein sort of legislative delegation that would empower the agency it creates to declare its own extent. Without at all intimating what weight should ultimately be assigned to the conclusions of Opinion No. 606, we are firm in our conviction that it does not oust the adjudicatory power of a court that has

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[17] 15 USCA 717r

reviewing authority over both the court and the agency proceedings.[18]

CONCLUSION

LP&L had no burden to demonstrate that its allegations of irreparable injury were correct on the preliminary hearing of its opponents' motions to dismiss. The FPC lacked jurisdiction over the previously certificated direct sales to Sterlington, and over the intrastate sales at Nine-Mile Point, therefore declining jurisdiction and requiring exhaustion was error. The order dismissing this cause is reversed and the cause is remanded with directions to expedite the hearing and disposition of this cause on its merits.

REVERSED and REMANDED,
with directions.

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[18] If Opinion No. 606 has any instant effect it may be contrary to United's urgings. In the sense that it is a final agency action, its finality could militate against United's claim that the agency's primary jurisdiction still bars court action. However, without pausing to consider the ramifications of collateral versus direct review rights since both court and agency action are before us now, we express no opinion on this aspect of the matter.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 71-2550

D. C. DOCKET No. 16637

LOUISIANA POWER & LIGHT COMPANY,

Plaintiff-Appellant,

VERSUS

UNITED GAS PIPE LINE COMPANY, ET AL.,

Defendants-Appellees,

FEDERAL POWER COMMISSION

Intervenor.

Appeal from the United States District Court for the Western District of Louisiana

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to

expedite the hearing and disposition of this cause on its merits;

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

January 14, 1972

Issued As Mandate:

APPENDIX C

IN THE

United States District Court

FOR THE
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. 16637

LOUISIANA POWER & LIGHT COMPANY,

VS.

UNITED GAS PIPE LINE COMPANY
AND PENNZOIL UNITED, INC.

MESSRS.

FOR PLAINTIFF: THOMAS W. LEIGH
THEUS, GRISHAM, DAVIS & LEIGH
P. O. Box 1671
Monroe, Louisiana 71203
ANDREW P. CARTER
MONROE & LEMANN
1424 Whitney Building
New Orleans, Louisiana

FOR DEFENDANTS: JOHN T. GUYTON
P. O. Box 1574
Shreveport, Louisiana 71102

WILLIAM R. CHOATE
BAKER & BOTTS
#1 Shell Place
Houston, Texas

NAUMAN S. SCOTT, Judge:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an injunctive proceeding brought by Louisiana Power and Light Company (LPL) against defendants United Gas Pipe Line Company (United) and Pennzoil United, Inc. (Pennzoil) to restrain and enjoin the defendants from curtailing the supply of gas to plaintiff's Sterlington and Nine Mile Point generating stations in Louisiana and ordering defendants to deliver natural gas to plaintiff in accordance with the provisions of the current contracts between LPL and United.

LPL is a Florida corporation having its principal place of business in the State of Louisiana and is a "public utility" within the meaning of the Federal Power Act, 16 U.S.C. 791(a) *et seq.* and is the owner and operator of the Sterlington and Nine Mile Point electric generating plants previously mentioned.

Pennzoil and its wholly-owned subsidiary, United, are Delaware corporations having their principal place of business in the State of Texas. United is engaged in the transmission of natural gas through transmission lines located in states including Louisiana, Texas and Mississippi and also delivers to interstate pipe line companies for resale. United has been furnishing natural gas to LPL at both the Nine Mile Point Station and the Sterlington Station under contract for many years.

JURISDICTION

LPL asserts that this Court has jurisdiction under 28 U.S.C. 1332 because this is a civil action in which the matter in controversy exceeds the sum or value of $10,000.00, and is between citizens of different states.

THE ISSUE

Pennzoil, United and the Intervenor, Federal Power Commission (FPC) dispute this Court's jurisdiction and have filed motions to dismiss on the contention that this matter involves a proceeding (curtailment of natural gas) which is presently before the FPC, that LPL is an active participant and a party to these proceedings before the Commission, and that the FPC has exclusive jurisdiction under Sections 4(b), 5(a), and 15 of the Natural Gas Act [15 U.S.C. 717(c), 717(d), and 717(o)].

FINDINGS OF FACT

1. United has supplied gas to LPL's Sterlington Station under contracts which include a provision entitled "Impairment of Deliveries" as follows:

> "In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers."

2. United has supplied gas to LPL's Nine Mile Point Station under contracts containing provisions entitled "Impairment of Deliveries" as follows:

> "Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of

public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers."

3. It is conceded that LPL is an industrial consumer and utilizes the gas delivered to it to generate the electric power at its Sterlington and Nine Mile Point stations and not for the purpose of resale.

4. All gas delivered by United to the Sterlington and Nine Mile Point Stations is produced in Louisiana. All deliveries of gas to the Sterlington Station are interstate gas. Deliveries of gas to the Nine Mile Station are made through the "Green" Pipe line which is located entirely within the State of Louisiana. The great bulk of the gas in the "Green" line is intrastate gas. However, some gas is dumped into the "Green" pipe line from the "Black" pipe line. This is interstate gas so there is a co-mingling of intrastate and interstate gas in the "Green" pipe line. An application is presently pending before the Federal Power Commission (RP71-89) to certify the "Green" pipe line.

5. United filed with the FPC on October 26, 1970 a petition for a declaratory order to curtail gas deliveries during the winter months (November 1 to April 1) on a ratable basis and in the following order: (1) gas used for industrial purposes, including gas used to generate electricity which in turn is applied to industrial uses, (2) gas used to generate electricity which is consumed by domestic customers, and (3) gas used by domestic consumers. United alleged that the curtailment was made necessary because the gas supply was insufficient to meet its contract requirements. Attached to the petition are exhibits including exhibits showing the

United customers affected by the proposed curtailment, as follows:

Jackson Area	
Industrials	6 customers
Power Plants	4 customers
Pipelines	2 customers
City Gates	1 customer
Mobile-Pensacola Area	
Industrials	17 customers
Power Plants	2 customers
City Gates	3 customers
Shreveport Area	
Industrials	5 customers
Power Plant	1 customer
Pipelines	6 customers
City Gates	2 customers
New Orleans Area	
Industrials	4 customers
Power Plants	3 customers
City Gates	2 customers
Lafayette Area	
Industrials	2 customers
Power Plants	1 customer

These are the parties (customers) affected by the FPC proceeding RP71-29 who are not parties to this suit.

6. LPL filed its petition to intervene in RP71-29 on November 25, 1970 stating the "impairment of deliveries" articles of its contracts with United. It also stated its proposed curtailment violated these contracts: that the FPC did not have jurisdiction over United's sales to LPL because they constitute "direct sales" which are exempt under Section 1(b) of the Natural Gas Act and requests to participate in the hearing without waiving these objections. (FPC Exhibit 3, Item 5).

7. The FPC approved United's curtailment program for the 1970-71 winter season by order in FPC Docket No. RP71-29 dated December 29, 1970 (FPC Exhibit 3, Item 7). This order was issued as a result of the settlement between the parties, including LPL.

8. United filed a supplemental petition in RP71-29 on February 22, 1971 for the extension of its curtailment program from April 1, 1971 through October 31, 1971 (FPC Exhibit 3, Item 3). The record does not disclose the number of identity of intervenors, including LPL, who intervened prior to November 25, 1970 in RP71-29, however, an order was issued March 10, 1971 permitting the intervention by Aluminum Company of America, Boise Southern Company, Container Corporation of America, Marquette Cement Manufacturing Company, National Gypsum Company, New Jersey Natural Gas Company, Scott Paper Company, Transcontinental Gas Pipeline Corporation and United Gas, Inc., and on April 12, 1971 an order issued permitting the intervention of the City of Pensacola, Florida, et al, Clarke-Mobile Counties Gas District, General Services Administration, Northern Illinois Gas Company and Mississippi Public Service Commission (FPC Exhibit 3, Items 9 & 10).

9. LPL has not denied United's assertion that its supply of gas is inadequate to meet its present and impending gas delivery commitments. It has, in fact, agreed to the curtailment approved in the order of December 29, referred to in Finding 7 above. The fact that the Natural Gas Transmission Industry has recently experienced a decline in the ratio of crude natural gas reserves to annual volume of consumption caused in part by the increasing demand for natural gas by customers and the declining rate of additions to the natural gas reserves has been judicially noticed by the Fifth Circuit, *Austral Oil Co.* v. *Federal Power Comm'n.*,

428 F.2d 405 (5th Cir.), Cert. denied, 400 U.S.C. 950 (1970) (Southern Louisiana Area Rate Cases).

10. FPC Order No. 431 directed interstate pipe lines, including United, to take steps, including filling storage fields, in order to insure capacities to meet the heating season demands for the winter of 1971-72 (November 1, 1971 to March 31, 1972). The Order further directed the pipe lines to file plans within thirty days indicating the way in which the pipe lines proposed to meet the winter heating season demands. United filed its response on May 17, 1971; the Commission docketed the response under FPC Docket No. RP71-120 and then on May 28, 1971 order Docket No. RP71-120 consolidated for hearing and decision with Docket No. RP71-29. That order provided that persons who are parties to the proceeding in Docket No. RP71-29 will be deemed to be parties in the consolidation and need not file to intervene in Docket No. RP71-120.

11. LPL has alleged (Complaint Paragraph 17) that the proposed curtailment by United could ultimately effect a "black-out" or "brown-out" which, under certain circumstances, could cover an area as large as the whole State of Louisiana or, indeed, a several-state area such as occured during the notorious "northeast black-out" in 1965. The record is bare of any evidence to support this allegation.[1]

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[1] Mr. J. M. Wyatt, Vice President of LPL, testified as follows when cross-examined by Mr. Gooch, representing the FPC:

"BY MR. GOOCH:

Q. All right, sir. Now, let's look under such things as litigation and regulations in the registration statement filed by the SEC. Mr. Carter has just said that they were not going to assume they would lose any suits. Would you show me anywhere in this registration statement filed in April, where Mr. Carter even disclosed to the public that there was a suit pending which could cause Louisiana Power and Light Company to suffer brown-outs and black-outs if this allegation were true?

In fact, in a registration statement filed by LPL with the Securities and Exchange Commission on February 19, 1971, the following statement was made:

"FUEL SUPPLY. The Company's primary fuel is natural gas. Two of the Company's three major generating stations are outfitted to burn oil as a standby fuel, and the third station is presently being modified to allow the burning of oil as a standby fuel and this modification is scheduled for completion by June 1971. The Company has firm contracts for an adequate supply of gas for all generating capacity which is or will be operational prior to 1974 (3404 MW), which contracts have various expiration dates from 1978 to 1993. During the winter of 1970-71 gas was curtailed to some extent by one supplier who supplies gas to approximately 550 MW of generating capability. After June 1971 the Company expects to be able to offset any foreseeable gas curtailment by burning oil. The supply of fuel for generating units that will become operational in 1974 and thereafter is being negotiated at this time." FPC Exhibit 21.

A. If I understand your question, I don't see why it would be necessary to notify, because there was nothing involved here that would cause brown-outs or black-outs on this suit.

Q. Nothing involved in the suit?

A. In the suit that I am looking at here, if I understand your question.

Q. My question is — is the suit that we are here in Court for today, do you see that disclosed anywhere, to the public, that it is pending?

A. No, it is not in here.

Q. All right. Now, would you please look at the date of this certificate?

A. Yes.

Q. Will you tell the Court what this is?

A. May 19, 1971.

Q. Are you aware of the filing with the SEC that would either call to the attention the pendency of this suit to those who may be interested in purchasing Louisiana Power and Light securities or reporting any change in your fuel oil situation subsequent to May 19, 1971?

A. I am not aware of it." (Tr. p. 103).

12. On March 31, 1971, LPL, although it was an active participant in the curtailment proceeding before the FPC, filed its complaint in this Court, seeking to enjoin United's curtailment program insofar as it affected LPL's Sterlington and Nine Mile Point Stations. The trial Court, after considering the pleadings of LPL and the briefs and arguments of its counsel granted a Temporary Restraining Order on April 27, 1971.

13. On April 28, 1971, the FPC intervened and filed a Motion to Dismiss for lack of subject matter jurisdiction. United-Pennzoil, on April 29, 1971, filed its Motion to Dismiss.

14. The Court considering the additional pleadings then before it, dissolved the temporary restraining order on April 29, 1971 and dismissed the case for lack of jurisdiction. LPL filed a Notice of Appeal and moved for a stay order which the Court refused. The matter is now before this Court on an Order of the Fifth Circuit Court of Appeals dated May 14, 1971 vacating the trial Court's judgment of dismissal and remanding the case to the District Court for an expedited hearing on the jurisdictional issue and such other preliminary issues as might be properly raised.

15. The original trial judge having recused himself, the matter was assigned to this Court for hearing and a full evidentiary hearing was conducted on May 27, 1971.

CONCLUSIONS OF LAW

LPL seeks an injunction restraining and enjoining United and Pennzoil from curtailing the supply of gas to the Sterlington and Nine Mile Point generating stations of LPL in breach of United's contracts with LPL, and ordering said

companies to deliver natural gas to LPL in accordance with the provisions of said contracts.

LPL is not entitled to injunctive relief unless it clearly establishes that it is threatened with irreparable injury. It alleges that its Sterlington Station has no alternative source of energy (Complaint Paragraph 17) and that the implementation of the curtailment might result in an extensive "Brown-out" or "Black-out" (Complaint Paragraph 16). LPL has failed to establish irreparable injury (Findings of Fact No. 11) and therefore is not entitled to injunctive relief. However, the Court does not choose to rest judgment solely on these grounds, since the Court of Appeals has directed that a specific finding should be made on the jurisdictional issue.

LPL forcefully contends that this Court has primary jurisdiction and that the FPC lacks jurisdiction because (1) the gas delivered to the Nine Mile Point Station is "intrastate gas" not subject to the jurisdiction of the FPC and (2) direct sales such as the sales from United to LPL are exempt from the jurisdiction of the Commission under the provisions of Section 1(b) of the Natural Gas Act (15 U.S.C. 717).

It is not clearly established by the record that the gas delivered to the Nine Mile Point Station is "intrastate gas", since some "interstate gas" is dumped into the system which supplies the Nine Mile Point Station (Findings of Fact No. 6). The determination of this question is within the fundamental jurisdiction of the FPC, requires the expertise of that agency and is presently pending before that Agency in Docket No. RP71-89. The same problems were properly disposed of in the Florida Parishes cases. In the Matter of United Gas Pipe Line Company, Docket No. CP 62-161, 30 FPC 560, affirmed on appeal, sub nom., *Louisiana Public*

Service Commission et al v. *Federal Power Commission et al*, 359 F.2d 525, cert. denied, 385 U.S. 833, 17 L.Ed. 68, 87 S.Ct. 73.

LPL's second contention is predicated on a finding that the question at issue is the violation of provisions of its direct sales contract with United. However, United's application to the FPC in RP71-29 is couched in terms of a curtailment proceeding (FPC Exhibit 3, Item 1). The exhibits and testimony pertaining to volumes of gas — supply and delivery. It seems fairly obvious that if the Court required delivery of the full gas contract commitment to LPL, the gas supply available to United's other customers would be reduced and the curtailment of gas supply to other customers would be proportionately affected. Thus all of United's customers have an interest, including more than 50 intervenors in RP71-29. A cursory examination of the testimony and the exhibits produced at the hearing before this Court on May 27 will demonstrate the complexities and the technical nature of the matters involved in United's application and the special expertise required to resolve it. This is a curtailment proceeding. The proposed curtailment program certainly affects deliveries to United's customers under direct sales contracts such as LPL. However, this is a collateral effect of the curtailment and does not necessarily convert it into an attempt by the FPC to exert jurisdiction over such direct sales contracts.

The threatened irreparable injury alleged by LPL (possible "brown-out" or "black-out") is related solely to the volume of gas delivered. There is no proof that LPL actually requires its full contract commitment of gas to avoid this consequence. It received less than contract commitments during the winter months of 1970-71 without experiencing such injury. This Court cannot assume, especially in an injunction proceeding, that the full contract commit-

ment of gas is required by LPL to avoid its alleged injury. The injunction could not be granted if standby fuel, as alleged by defendants, is available. The contracts are strictly collateral to the issue before the Court.

United, Pennzoil and the FPC urge that LPL is not entitled to judicial relief until it has exhausted its administrative remedies in the FPC. The Courts have not uniformly followed this precept. Professor Davis, in his *Administrative Law Treatise*, Volume 3, Section 20.03, Page 69, suggests factors which should be considered in determining whether this precept should be followed:

> "The key factors are three: extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction. Unfortunately, each of these three key factors is a variable, and each often calls for a considerable amount of judgment for its proper appraisal.
>
> A workable standard probably should not go beyond a statement that each of these three factors should be weighed in determining whether or not a court should decide an issue of administrative jurisdiction without requiring exhaustion of administrative remedies. A neat word formula probably is not feasible."

As noted above, LPL has made no attempt to establish the minimum volume of gas which is required to maintain its service, or that the amount allocated to it under the curtailment program is insufficient to meet its minimum requirements. The contracts are hardly pertinent to these issues. The Court finds that LPL has not proved the extent of possible injury which might result from pursuit of the administrative remedy, that the curtailment proceedings are well within the jurisdiction of the FPC and that the

expertise of the FPC is necessary for the proper consideration and disposition of the issues presented in this proceeding. LPL must exhaust its administrative remedies despite its assertion that the FPC lacks jurisdiction. *Myers* v. *Bethlehem Steel Corp.*, 303 U.S. 41, 82 L.Ed. 638, 58 S.Ct. 459; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 90 L.Ed. 839, 66 S.Ct. 712; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, 91 L.Ed. 1261, 67 S.Ct. 962, rev'g 156 F.2d 821; *Union Oil Co. of California* v. *Federal Power Commission*, 236 F.2d 816 (5th Cir. 1956), Cert. denied, 352 U.S. 696, 1 L.Ed. 323, 77 S.Ct. 360; and *Lone Star Cement Corp.* v. *Federal Trade Commission*, 339 F.2d 505. The FPC is competent to decide its jurisdiction and should do so. *City of Hastings, Nebraska* v. *Federal Power Commission*, C.A.D.C. 221 F.2d 31; *Marine Engineers* v. *Interlake S.S. Co.*, 370 U.S. 173, 8 L.Ed.2d 418, 82 S.Ct. 1237.

The motions of United, Pennzoil and the FPC to dissolve the temporary restraining order and to dismiss this suit are granted and the temporary restraining order heretofore issued on April 27, 1971 is dissolved.

Counsel for defendants United and Pennzoil and for Intervenor FPC immediately shall prepare a proper decree and obtain approval thereof from counsel for plaintiff LPL in accordance with Rule 9 of this Court and present such judgment for signature as expeditiously as possible.

THUS DONE AND SIGNED at Alexandria, Louisiana, this 25th day of June, 1971.

NAUMAN S. SCOTT
United States District Judge

APPENDIX D

§ 717 Necessity for regulation of natural gas companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce; to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern

and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36.

§ 717c. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the juris-

diction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into

effect, and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. June 21, 1938, c. 556, § 4, 52 Stat. 822; May 21, 1962, Pub.L. 87-454, 76 Stat. 72.

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company

in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. June 21, 1938, c. 556, § 5, 52 Stat. 823.

§ 717f. Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facili-

ties with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in

interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be

issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension or acquisition, to the extent authorized by the certificate is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation

of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. June 21, 1938, c. 556, § 7, 52 Stat. 824; Feb. 7, 1942, c. 49, 56 Stat. 83; July 25, 1947, c. 333, 61 Stat. 459.

§ 717o. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the

manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. June 21, 1938, c. 556, § 16, 52 Stat. 830.

§ 717r. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such pro-

ceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by

substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1938, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646; § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

ABANDONMENT-CERTIFICATES — DIRECT-SALE CONTRACTS — DECLARATORY ORDER — EMERGENCY-GAS SUPPLY — JURISDICTION — PUBLIC INTEREST — SERVICE — TARIFFS — TRANSPORTATION IN INTERSTATE COMMERCE

Before Commissioners: JOHN N. NASSIKAS, *Chairman;* ALBERT B. BROOKE, JR., and PINKNEY WALKER

UNITED GAS PIPE LINE COMPANY

Docket Nos. RP71-29, RP71-120, RP71-99

OPINION No. 606

OPINION AND DECLARATORY ORDER FINDING JURISDICTION, REMANDING SOME ISSUES TO EXAMINER, DISMISSING MOTION TO SEVER, DENYING AND DISMISSING MOTIONS TO ENLARGE SUSPENSION PERIOD, AND DISMISSING PETITION FOR DECLARATORY ORDER TO INTERPRET CONTRACT TERMS

(Issued October 5, 1971)

PER CURIAM:

HISTORY OF PROCEEDINGS

This proceeding was commenced by the filing on October 26, 1970, of a petition in Docket No. RP71-29 by United Gas Pipe Line Company (United) requesting a declaratory order from this Commission finding the curtailment plan to be implemented by United in the event of impaired deliveries was consistent and in keeping with Section 12 of

the General Terms and Conditions of United's FPC Gas Tariff, First Revised Volume No. 1.[1] United projected a shortage of gas supplies during the 1970-1971 heating season and possibly thereafter which would not be adequate to meet the contract demands of all of its customers. Its curtailment program initially designated three usage categories (later amended to five categories) for purposes of priority of service or its converse, curtailment. Tliese were, in order of the lowest priority and curtailed first — gas used for industrial purposes, including gas to generate electricity for later industrial use; the second lowest category — gas used to generate electricity consumed for domestic customers; and the highest order of priority — gas used by domestic customers.

Motions and answers were filed objecting to United's petition and asking that we decline to render a declaratory order or that we deny United's petition.[2] The Commission recognized the urgency of the questions presented because the heating season had already begun and because United had placed its curtailment program into effect on November 1, 1970, as it was obligated to do. On December 10, 1970, we ordered hearings to commence on December 21, 1970, and the purpose of the hearings was:

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[1] These provisions are found in United's filed tariff as Original Sheet No. 71 issued on December 1, 1954, effective August 1, 1954, and First Revised Sheet No. 72 issued on October 31, 1969, effective December 16, 1969. United amended its petition on November 20, 1970, requesting the Commission to order Mobile Gas Service Corp. to cease circumventing United's curtailment plan by reselling its allocated volumes to other customers of United.

[2] Mobile Gas Service Corporation (Mobile) filed a motion on November 10, 1970; Texas Eastern Transmission Corporation (Texas Eastern) filed an answer to United's filing on November 23, 1970; Stauffer Chemical Company (Stauffer) protested United's petition on November 25, 1970, and requested that the Commission reallocate gas deliveries under a more constructive and reasonable plan.

> * * * to resolve the questions presented in United's petition, its amendment thereto and the motions, answers, and protests which those two documents filed by United have engendered, and to determine (a) the proper interpretation of Section 12 of the General Terms and Conditions of United's FPC Gas Tariff and whether the curtailment program placed into effect by United on November 1, 1970, is in accordance therewith, (b) whether it would constitute undue discrimination under the provisions of the Natural Gas Act if a curtailment program placed into effect on United's system did not apply equally to the jurisdictional and direct sales customers of United and (c) whether it would be appropriate for the Commission at this time to consider the question of reallocation of United's total gas supply among all of United's customers, and if so, on what basis should such reallocation be made. * * *.

United thereafter proposed an interim settlement which was accepted by all parties except Monsanto Chemical Corporation. The Commission approved the settlement on December 29, 1970.[3] In light of the emergency situation which confronted United, we approved the interim curtailment plan to remove uncertainty of operation on United's system during the winter heating season which was then in progress. This settlement tended to meet the objections of the interveners, provided for cooperation in the curtailment program through March 31, 1971, and provided that United would attempt to make spot purchases of gas, if possible. It also resolved temporarily the dispute between United and Mobile, the subject of United's November 10, 1971 amendment to its petition. All legal issues were reserved to be determined at a later date; interveners did

[3] The Commission denied Monsanto's petition for rehearing of the settlement approval on February 26, 1971. Monsanto's appeal to the United States Court of Appeals for the District of Columbia is pending in Docket No. 71-1306.

not admit the curtailment plan was either authorized or required. They agreed not to seek injunction or damages for curtailments through that period but did not waive the right to seek recovery of capital costs for alternative fuel facilities incurred prior to March 31, 1971. Hearings were recessed on December 22, 1970, and, with agreement of all parties, hearings did not reconvene until March 31, 1971.

Since that order of December 10, 1970, which set the proceedings for hearing, the 1970-1971 heating season has passed, and United filed, on February 22, 1971, a supplemental petition for declaratory order in Docket No. RP71-29 to provide for curtailments beginning April 1, 1971, for the 7-month summer season. This supplemental petition requested sanction of an extension of United's curtailment program from April 1, 1971, to at least through October 31, 1971, and altered the method of calculating curtailments to meet the system's summer needs. United amended its February 22, 1971, supplemental petition on June 14, 1971, to correct errors in the initially filed summer curtailment program. On March 10, 1971, United filed a Second Revised Sheet No. 72 to become effective June 2, 1971. This sheet was, among other things, intended to clarify the intent of Section 12.1 of United's tariff. Our order of May 18, 1971, suspended these revisions until June 22, 1971, and consolidated that clarification herein.[4]

United filed proposed tariff revisions in Docket No. RP71-120 to become effective on November 1, 1971, to cover curtailments for the 1971-1972 winter heating season and for

[4] The addition of a new Section 12.3 to United's General Terms and Conditions to eliminate United's obligation to reduce a buyer's demand charge by virtue of proration was at that time consolidated for hearing in another proceeding, Docket No. RP71-41.

an indeterminate period thereafter.[5] This recent filing revises the impairment of deliveries provisions in Section 12 of the General Terms and Conditions portion of United's tariff by adding two new categories of curtailment priorities. It also provides that no payments or credits for substitute fuels will be made or given by United in the event of curtailment, and prohibits resale customers from offsetting the effects of United's curtailments by purchasing valley gas available from another customer of United.

All parties rested on July 27, 1971, after 43 days of hearings; initial briefs were filed August 27, 1971, and reply briefs were submitted September 20, 1971. On August 23, 1971, this Commission granted a motion for omission of the intermediate decision to prevent delay in resolving the important questions raised by United and interveners in these proceedings. It is important that we now determine, before the next winter heating period commences, the initial and crucial question in this proceeding, whether this Commission has the authority to accept and approve tariff filings for curtailment plans affecting both sales for resale and direct sales when that curtailment plan is necessitated by the public interest. We now find and conclude in the affirmative.

Other issues to be determined by these hearings, as set forth in our December 10, 1970, order, such as those relating to the implementation of United's curtailment plan pursuant to Section 12 of United's tariff, and relating to whether the Commission should consider reallocation of United's

[5] United filed these sheets on May 17, 1971, pursuant to our Order No. 431, in Docket No. R-418. They are designated First Revised Sheet No. 71, Third Revised Sheet No. 72 and a new sheet, Original Sheet No. 72-A. This filing was designated as Docket No. RP71-120 and in part consolidated herein and suspended for one day to November 2, 1971, by a May 28, 1971, order in these proceedings.

total gas supply, together with any other unresolved questions raised by United's petitions and the answers thereto, we shall remand to the Presiding Examiner for his recommended decision thereon.

A word is in order about another pending United proceeding in Docket No. CP71-89. There United filed an application on October 1, 1970, requesting a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act to continue operating certain facilities and to continue service heretofore treated as local and intrastate in character. These facilities are known as the New Orleans Division of United's system. A central question in that proceeding is whether those facilities are interstate in character and subject to our jurisdiction. To the extent, if any, they are found to be so, our ruling in this proceeding concerning the Commission's jurisdiction over curtailment programs will apply to volumes transported through those facilities.

JURISDICTION AND CURTAILMENTS

Several parties assert that the Commission has no jurisdiction to allocate gas in curtailment proceedings in a manner inconsistent with existing direct sale contracts. It follows from this argument, that if the gas supply is insufficient to meet the contracted requirements of all consumers, then the direct industrial users might get their gas first, leaving only the remainder to the resale consumers — made up of households, hospitals, schools, public buildings, and industrial and commercial establishments in all states served by the jurisdictional pipelines.

We find herein, based upon the Natural Gas Act and the precedents thereunder, that this Commission has the plenary authority to allocate the gas supply of jurisdictional

pipelines to all customers, including direct industrial users, regardless of any contracts with individual customers, direct or resale.

A review of the record in these proceedings constrains us to render a declaratory order pursuant to United's petition filed October 26, 1970, as amended. Present here are two principal criteria guiding the policy in favor of rendering a declaratory judgment: a judgment will serve a useful purpose in clarifying and settling legal relations and issues and will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942, 944 (CA6, 1949).

At the outset we note that direct industrial sales cannot be made without a certificate from this Commission and that the Commission must determine whether the public convenience and necessity is met in light of the proposed terms of that sale.[6] In addition, the Commission, pursuant to Section 7(b), must determine whether a direct sale — or any sale — should be abandoned because of depleted gas supply or because it no longer meets the public convenience or necessity. The price at which the direct industrial sale is made is thus material in both certificate and abandonment proceedings. Short of considering rates as a factor in all certification or abandonment proceedings, the Commission does not assert jurisdiction to determine the rates at which direct sales to industrial customers will be made, but it does not follow that we have no jurisdiction over the transportation and deliveries to direct customers for the following reasons.

Our jurisdiction to oversee the implementation of curtailment plans derives, *inter alia*, from Sections 1(b) and 4

[6] *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467, 471 (CA3, 1956).

of the Natural Gas Act. Section 1(b) states that "The provisions of this act shall apply to the transportation of natural gas in interstate commerce * * *."[7] Several parties claim that language within Section 1(b) limits our jurisdiction here, "* * * this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale * * * but shall not apply to any other transportation or sale * * *." This is urged as indicating that our jurisdiction does not extend to the sales of gas for direct use and thus, *a fortiori*, does not extend to curtailments of gas sold for direct use. We agree Section 1(b) limits our jurisdiction over the rate at which direct sales are made, *F.P.C. v. East Ohio Gas Co.*, 338 U.S. 464 (1950); *City of Hastings, Nebraska v. F.P.C.*, 221 F.2d 31, 39 (CADC, 1954), *cert. denied*, 349 U.S. 920 (1955), but in exercising our certificate jurisdiction or jurisdiction over the abandonment of direct sales, we must and do consider the rates at which direct sales are made. However, Section 1(b) also provides us with jurisdiction over the transportation of gas in interstate commerce, and there lies our power and duty to act at this time of curtailments. Any transportation by a jurisdictional pipeline is in interstate commerce, including the transportation and sale of gas to a direct industrial user. *Panhandle Eastern Pipe Line Co. v. F.P.C.*, 232 F.2d 467 (CA3, 1956), *cert. denied*, 352 U.S. 891 (1956).

Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507, 516-517 (1947), is cited by some parties for the proposition that Congress did not intend this Commission to regulate direct sales for consumptive use. But the case in no uncertain terms stands for the opposite conclusion. There Panhandle challenged the Public Service Commission's authority to require the filing

[7] 52 Stat. 821 (1938), 15 U.S.C. Sec. 717(b).

of information to regulate direct sales. To support its position, it argued that state regulation of direct sales would result in a conflict among states on the issue of curtailments during periods of gas shortage. The United States Supreme Court affirmed a ruling upholding the Indiana Commission's authority to regulate certain aspects of direct sale; but in affirming, the Supreme Court recognized its holding was not the broad stroke delimiting all forms of Federal regulation concerning direct sales that those opposing our exercise of jurisdiction now argue. There the court merely found, "* * * the states are not made powerless to regulate the sales in question by any supposed necessity for uniform national regulation * * *." (332 U.S. at 523-4). In so finding it did not find conversely that this Commission is powerless in the area.[8] The Court specifically recognized this Commission's authority to act on a national level in instances relating to direct sale curtailments (332 U.S. 523):

> Appellant also envisages conflicting regulations by the commissions of the various states * * * particularly in relation to *curtailment of service* * * * if such conflicts should develop, the matter of interrupting service is one largely related, as appellees say, to *transportation* and thus within the jurisdiction of the Federal Power Commission to control in accommodation of any conflicting interests among various states. [Footnote omitted; emphasis supplied.]

Curtailments thus do not relate to rates, they relate to transportation wherein our jurisdiction here lies. "And throughout the Act 'transportation' and 'sale' are viewed as separate subjects of regulation." *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950).[9] In *South Georgia Na-*

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[8] *Cf. F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 473-4 (1950).

[9] For further cases on this point see *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 359 F.2d 675, 682-3 (CA8, 1966).

tural Gas Co., 23 FPC 795 (1960), we said, "Section 1(b) of the Act . . . states that the Commission shall have jurisdiction over the 'transportation' of gas for direct sales, but not over the direct 'sales' themselves." 23 FPC at 796. Thus, while we generally do not assert jurisdiction to determine the *rates* at which direct sales are made (except in certificate or abandonment proceedings), we possess authority to regulate the *volumes* of gas transported for direct sale.[10]

It is argued that lack of rate jurisdiction over direct sales precludes our exercising jurisdiction over tariff provisions affecting direct sales. Among the cases cited for this argument is *Colorado Interstate Gas Co.* v. *F.P.C.*, 185 F.2d 357 (CA3, 1950). Unlike the situation in *Colorado*, the curtailment plans, as set out in this order, do not directly apply to rates and charges. Moreover, the court in *Colorado* relied upon *Panhandle Pipe Line Co.* v. *Public Service Commission of Indiana, supra*, for its holding but, as noted above, the Supreme Court in *Panhandle* specifically said that the exceptional situation created by curtailments would vest authority in this Commission to act. Also on this point, the holding in *Granite City Steel Co.* v. *F.P.C.*, 320 F.2d 711 (CADC, 1963) is not relevant and material to the question of our *jurisdiction* to approve and authorize curtailment plans because it concerned, instead, only the question of reallocating volumes to provide gas for new customers pursuant to Section 7(a) of the Act.

This jurisdiction over the transportation of gas in interstate commerce is and must be of a continuing nature, otherwise our jurisdiction over the direct connection in the first instance would be insignificant, *South Georgia Natural*

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[10] See *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947). *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467, 471-2 (CA3, 1956), *cert. denied*, 352 U.S. 891 (1956).

Gas Co., 23 FPC at 796. Nor does this continuing jurisdiction apply only to Section 7 issues alone, for it is axiomatic that whenever our jurisdiction applies in the first instance pursuant to Section 1(b) of the Act, each of the Act's other provisions may be utilized to carry out the regulatory purposes of Congress for which jurisdiction was to initially attach; except, and only except, to the extent limited by Section 1(b) of the Act. The general object and purposes for which the Act was passed includes the desire to eliminate and prevent unfair, unreasonable or discriminatory service to the gas consuming public. This cannot be accomplished without full authority to rule upon a curtailment plan; a matter toward which our authority over the transportation of gas for resale or direct sale must be aimed. Our transportation jurisdiction does not relate solely to arrangements whereby gas is transported for another pursuant to a transportation agreement but it relates also to the transportation of gas for direct sale by the pipeline, *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950); *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467, 471-2 (CA3, 1956), *cert. denied*, 352 U.S. 891 (1956).

Curtailment situations are not new. Shortly after World War II, gas was not available in quantities equal to the demands of firm customers. Questions concerning supply allocation arose between Panhandle Eastern Pipe Line Company and its customers. This Commission took an active part in assuring fair application of gas allocations. We required Panhandle to file "proposed rules and regulations to govern curtailment and interruption of gas service." Following hearings on the proposals filed, and voluntary agreement, emergency rules for curtailment became embodied in Panhandle's rate schedules. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 5 FPC 983 (1946). These

rules affected direct customers of Panhandle as well as wholesale customers."[11]

The outcome of the litigated cases that followed Panhandle's curtailment left no doubt that our authority extends to allocating or approving the allocation of volumes of gas during gas shortage situations. We ruled on precisely this issue with respect to contracts filed pursuant to Section 4 of the Act in *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196, 203-4 (1947). In *Michigan Consolidated Gas Co.* v. *F.P.C.*, 203 F.2d 895, 900 (CA3, 1953) the court said, "The problem of the allocation of service to various customers is one which calls for judgment within the Commission's peculiar and expert competence." In another case, *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 226 F.2d 60 (CA6, 1955), *cert. denied* 350 U.S. 987 (1956), the court affirming a lower court's refusal to assume jurisdiction of a claim for damages under a gas contract breached, of necessity, due to a gas shortage, said (226 F.2d at 70):

> * * * The problems * * * involved * * * "intricate problems of service as between different users and different geographical sections" and required for their decision the technical understanding and expert knowledge of the Commission. The transactions * * * relevant involve eight states and great metropolitan areas. The problems of changing industrial conditions and growing needs for natural gas both territorially and otherwise are so extensive they do not lend themselves in the first instance to hearing before a court and require the expertise of the Commission.

Similarly, in *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784, 789 (CA6, 1949) the

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[11] The following year voluntary agreements could not be reached but similar rules for curtailments were again issued. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196 (1947).

court said, "* * * the operation of existing facilities in such manner as is sought may * * * result in changes of service to other customers without undue preference or undue discrimination within the power of the Commission to control * * * *"

This latter language pinpoints the need for our authority to act here. A system-wide gas shortage reduces volumes transported and necessarily causes a change in the operation of existing facilities that serve customers in several states in several regions; each with unique climatic, geographic and economic characteristics, and can affect service to homes, schools, hospitals, and other institutions. Without our exercising plenary jurisdiction over all phases of curtailment, any of the pipeline customers might be the object of undue discrimination stemming from some customers taking deliveries of gas for direct industrial consumption in one state in such quantities as to impair deliveries to cities and towns in the same or other states, with uncontrolled disruption resulting therefrom.

Our continuing control over the transportation of all gas transported or sold, whether for resale or direct sale for consumption, to carry out the basic intent of the Act, insofar as we are not specifically precluded by Section 1(b), runs in part to preventing the type of discriminatory practices set forth in Sections 4(b) and 5(a) of the Natural Gas Act.[12]

Those sections of the Act cover a broader range than simply the regulation of rates or charges. While that portion of Section 4(b) of the Act prohibiting "undue preference or advantage * * * or * * * undue prejudice or disadvantage" or that portion which does not permit any pipe line to "maintain any unreasonable difference in rates,

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[12] 52 Stat. 822, 823, (1938); 15 U.S.C. Secs. 717c, 717d.

charges, service, facilities, or in any other respect * * *", may be applied to prevent the evasion of "just and reasonable rates," they may be applied equally to prevent discrimination in "service," which in curtailment cases, as here, may not be quantifiable into rates. In such instances, our regulatory power granted in Sections 4(b) and 5(a) of the Act would be unduly restricted were we unable to oversee all curtailments affecting service. The Supreme Court has specifically pointed to that language within Section 5(a) of the Act relating to the Commission's authority to correct "unjust, unreasonable, unduly discriminatory, or preferential" activities or contracts and said, "It is clear that contracts covering direct industrial sales come within that * * * clause of Section 5(a)." *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635, 647 (1945). Thus, it is our duty to determine whether the practices forbidden in Section 4(b) or 5(a) of the Natural Gas Act in fact have occurred and to prevent any such practices from occurring or continuing to occur pursuant to United's filed tariff.

To carry out this mandate, a uniformly applied curtailment plan is required; one that necessarily involves several states would be virtually uncontrollable at the state regulatory level. Operating factors such as pressures at various system points, demands, and supplies are all relevant to a curtailment plan's operations, and jurisdiction to oversee all these factors is required — the states are powerless to control sufficiently and individually all these factors to provide fair service to consumers in each of their states and in other states. We must act, and our action must include direct sales, or else no effective control over curtailments will be possible.

In the past, when the extent of our jurisdiction to act has come into issue, the answer has required a return to the basic purposes of the Act. Many times stated, it is in the

intent to give full protective coverage to the consumer. *Atlantic Refining Co.* v. *P. S. C. of New York*, 360 U.S. 378 (1959). Courts have often found it necessary in protecting the public interest that we rule in ways affecting direct sales. See *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 359 F.2d 675, 682-3 (CA8, 1966). Full protection is obviously lost unless we oversee these curtailment plans in their entirety. If we refused jurisdiction here on the grounds that all regulation affecting direct sales in any manner is forbidden by Section 1(b) of the Act as a matter of local concern, comprehensive regulation of United's operations during curtailments would be impossible, since a uniformly fair plan coordinated by the State commissions could not reasonably be expected to be overseen by them. This is precisely the type of problem which the Natural Gas Act was intended to alleviate. Thus, our action here does not usurp state regulatory functions; it undertakes to do that which the states acting individually cannot effectively do and thus complements state regulation.

It is argued that even assuming the Commission has full jurisdiction over curtailment plans, the curtailment program must still be consistent with contractual obligations. We do not agree. Our determination concerning the curtailment plan must be undertaken without regard to the many and various contractual obligations of United. In considering the curtailment plan presented by United, we must appraise it to determine whether it is a proper and equitable approach in view of the anticipated extent of the curtailment, the relative interests and positions of the customers and others affected, and the overall gas supply situation. It is well settled that pipelines and other parties cannot by contract avoid their public interest obligations once our jurisdiction attaches. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137 (1960).

The best example of why we cannot provide that curtailment programs meet all contractual obligations is the case before us. United's contracts provide generally that gas for domestic consumers has the highest priority and that remaining gas shall be prorated by United among its other customers. No provision is made in these contracts for priorities based upon other superior needs or purposes that may be valid and required by the public interest. For example, United's own proposed priority categories for industrial users, or for users of gas as a raw material, might be required by the public interest. Other priority categories might also be valid, such as gas used for national defense purposes. Thus, merely because United's direct sale contracts fail to provide adequately for all situations related to service in the public interest — which we are bound to protect — should not and must not limit our authority here. Nor can it be supposed that the parties or the Commission should foresee at the time of certificate approval all possible public interest priorities that might supersede the contractual obligations to deliver gas.

There is no doubt that the present gas shortage has created new circumstances giving rise to the need to consider more carefully whether the sales of a pipeline are fully compensatory so as to enable the continued efficient and economic operation of pipelines in all areas, financial as well as operative, and to better enable the acquisition of gas supplies so desperately needed. Given these new circumstances, we must be free to act on a broad geographic front across state lines to mitigate the interstate effect of gas shortages consistent with Congress' intention "* * * to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. * * *" *Panhandle*

Eastern Pipe Line Co. v. *Public Service Commission of Indiana*, 332 U.S. 507, 520 (1947).

Some parties have argued that we may consider curtailment programs only under Section 7(b) of the Act as proposals to abandon service. We do not find that when curtailments are required due to a gas shortage that it is necessary to file a request for abandonment of service pursuant to Section 7(b) where, as here, the service reduction or stoppage foreseen is one of a temporary nature and where there is expectation that prior service levels will be resumed when gas supplies are available. We agree with our previous holdings in *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196, 203 (1947), that we have jurisdiction and authority under Sections 4 and 5 of the Act to consider, approve, or establish curtailment programs as the circumstances may require in assuring reliability of service to the public served by interstate pipeline companies.

We could, if we so chose, amend, pursuant to Section 16 of the Act, our previous certificate orders relating to the transportation of gas by United for the sale to both resale and direct sale customers in order to provide for this emergency curtailment situation not foreseen at the time the orders were issued initially. We could prescribe service criteria for each individual direct customer under our continuing certificate authority that might not afford each direct customer precisely the same treatment as all others as a result of varying circumstances and public interest considerations. Instead, we have chosen, as the means of administering curtailment plans, to require, pursuant to Section 4 of the Act, the filing of tariff sheets prescribing those plans and affording all interested parties an opportunity to be heard. Of course, this approach does not hinder our authority to grant emergency relief where special cir-

cumstances require it in the public interest.[13] These filings receive RP docket numbers because they relate to tariff changes, not necessarily to rate changes. Our Statement of General Policy in Docket No. R-418, Order No. 431, made clear our intent to approach curtailments in this manner. In our view, the filing of tariff provisions and providing hearings thereon will actually serve to reduce the opportunity for inequities between various individuals receiving gas from United.

On the other hand, it may be necessary to approve and order abandonment of service to various of United's direct or resale customers, should United's supply of natural gas be so depleted that the continuance of that service is unwarranted, or if the service or sale is no longer permitted by the public convenience or necessity. At a period when gas supplies are low, justification for the continuance of service may depend in part on whether such service makes a compensatory contribution to the pipeline so as to enable continued unimpaired operations. *Cf. South Georgia Natural Gas Co.*, 23 FPC 795, 797 (1960).

CATEGORY V.

We now turn to United's tariff changes filed May 17, 1971, in Docket No. RP71-120, proposed to become effective for the 1971-1972 heating season. United submitted three proposed tariff sheets pursuant to our Order No. 431 that are to become part of its First Revised Volume No. 1, consisting of First Revised Sheet No. 71, superseding Original

[13] See two orders issued July 2, 1971, in these dockets titled; Order Deferring Final Ruling On Motion For Interlocutory Order And Providing For Evidentiary Hearing, and Order Authorizing And Directing Interim Enforcement Of Curtailment Program Pending Final Determination Of Issues. See also our order herein issued July 28, 1971, titled Order Denying Motion For Reconsideration.

Sheet No. 71; Third Revised Sheet No. 72, superseding Second Revised Sheet No. 72; and Original Sheet No. 72-A.

These sheets would revise the existing Impairment of Deliveries provision contained in Section 12 of the General Terms and Conditions of United's tariff. They provide in Section 12.1 for a proration of impaired deliveries by setting out two new categories of service priority: Category II involving "process" gas and a new "lowest priority" Category V for power plant and industrial customers, whether served directly or indirectly by United, and paying a rate less than the applicable city gate jurisdictional rate at a 100 percent load factor in the same rate zone. The revised sheets also would prohibit curtailed customers from offsetting curtailments by obtaining gas from another supplier who obtains gas either directly or indirectly from United, and prohibit any customer of United from selling gas to anyone to offset gas curtailed. In addition, they would add to Section 12.3 a statement that no payments or credits for substitute fuels will be made or given in the event of curtailment.[14] United's filing in this docket did not request a declaratory order but was filed pursuant to our Order No. 431.

Most of the twenty-nine initial briefs that were filed in this proceeding have objected to portions of these new tariff sheets filed by United, particularly that portion respecting the establishment of the low priority Category V. Besides the initial question of whether the Commission may exercise plenary jurisdiction over curtailment plans (resolved above), United's filing of May 17, 1971, raises, among others, the question of whether the Commission should approve

[14] Section 12.3, entitled Demand Charge Adjustment and Substitute Fuel Payment Obligations, was first proposed on March 10, 1971, on Second Revised Sheet No. 72.

curtailment plans that essentially define a class of customers for curtailment purposes as those who pay noncompensatory rates.

We find that the tariff language proposing Category V should be rejected for the reasons herein stated. United must file by November 2, 1971, new tariff sheets eliminating that language concerning Category V and realigning all customers into the four remaining categories for the Examiner's and our consideration on the merits. United attempts to justify its Category V upon a need to obtain revenues from its sales which are compensatory. This, it says, would help remedy the shortage by affording it an opportunity to spend more money to enable it to obtain new reserves. We find that there is little correlation between the need to curtail deliveries because of inadequate gas reserves and the degree of compensation received for the sale of the limited gas supplies which are available. If United believes certain sales are adversely affecting its ability to serve its customers and its ability to serve the public interest, it should instead request authority to abandon those sales pursuant to Section (b), regardless of any contracts affected.

SUBSTITUTE FUEL CLAUSE ADJUSTMENTS

We should now also consider questions before us regarding the substitute fuel clauses proposed in Section 12.3 of United's tariff. These questions first came before us when United filed, on March 31, 1971, in Docket No. RP71-99, a petition for a declaratory order requesting we issue an order determining and limiting United's obligations under substitute fuel clauses in five of its contracts with three customers purchasing gas under those contracts from

United.[15] That docket was consolidated with the other dockets in this proceeding by order of September 15, 1971. We said the issues raised therein are questions of law not requiring an evidentiary hearing and are similar to the other issues in this proceeding.

Similar questions arise in Docket No. RP71-120 as a result of United's filing Original Sheet No. 72-A which, in part, added to Section 12.3 of the General Terms and Conditions of its tariff the langauge, "* * * nor shall Seller be obligated to pay or credit such customers any sums with respect to substitute fuels burned by such customers during such a period of proration or interruption."

We decline to render a declaratory order in Docket No. RP71-99, and so dismiss United's petition, because it requests an interpretation of contract terms unnecessary in light of our action herein exercising jurisdiction over curtailment plans.

Implementation of the curtailment plan itself, pursuant to our procedures, would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts affected by curtailments that may be initiated in the courts. No additional tariff language like that proposed in Section 12.3 on Original Sheet No. 72-A is necessary to limit liability under contracts when agencies' orders, rules, or regulations authorize actions contrary to those contracts. In *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (CA6, 1949), the court refused to grant relief to Michigan Consolidated despite the existence of a contract between that Company and Panhandle. The court said (173 F.2d at 789):

[15] Answers were filed by the three parties to the contracts: International Paper Company, Mississippi Power Company, and Mississippi Power & Light Company.

> The collateral relief prayed by Consolidated is also, in our judgment, beyond the jurisdiction of the court to order without interfering with the regulatory powers of the Commission. * * * We do hold that adequacy and impartiality of service, in the light of existing circumstances, is within Commission control. This must be so if control over rates means anything, since adequate service is a necessary concomitant in the fixing of reasonable rates. * * * If the Commission has no authority to order adequate service to customers, in view of all the conditions and circumstances involved, the basic purpose of the Natural Gas Act fails of realization. We can attribute to the Congress no purpose to withhold from the Commission control over services. The power to prevent preferences and discrimination both as between individuals and classes, carried with it by necessary and inescapable implication, authority to regulate service.

In a similar case, *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942 (CA6, 1949) the court found invalid a lower court's temporary injunction granted to prevent curtailment of gas delivery from Panhandle to its distributor Michigan Consolidated. In so ruling the court said (177 F.2d at 944-45):

> In the Detroit case we were of the view that the Commission had power to prescribe emergency service rules and regulations with respect to deliveries of gas by a pipe line company to a distributor without regard to contract requirements * * *.
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> * * * * *
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> * * * As we have already seen, it is within the Commission's power to regulate service by emergency orders without respect to contract obligations.

The Supreme Court recognized this principle in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968), saying, "* * * the Commission has plenary authority to limit

or to proscribe contractual arrangements that contravene the relevant public interests." See also *L.N. Jackson & Company* v. *Royal Norwegian Government*, 177 F.2d 694, 697 (CA2, 1949), stating, "For it is well settled that a contractual duty is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prohibited by an administrative order made with due authority by an officer of the United States. Restatement, Contracts § 458(b), 1932; Williston on Contracts, §§ 1938, 1939, Rev. Ed. 1938."

Therefore, the language in United's tariff precluding the operation of substitute fuel clauses when curtailments are properly implemented is unnecessary.

GAS CURTAILMENT OFFSET

United has proposed tariff language in Docket No. RP71-120 that would prohibit the purchase or sale of gas between a customer of United and another customer of United to offset gas curtailed by United. That language is:

> Furthermore, no customer so required to curtail will obtain gas to offset such curtailment from a supplier who obtains such offset gas either directly or indirectly from Seller, nor shall any customer of Seller sell gas to anyone to offset gas curtailed in accordance herewith.[16]

We reject this proposed language as beyond our jurisdiction to approve. Our jurisdiction over the disposition of natural gas ends when it reaches the hands of a nonjurisdictional person such as a distributor purchasing for resale. This language would in effect attempt to extend our jurisdiction over the disposition of gas by a local distributor, a matter within the province of the local regulatory body. We

[16] See United's Third Revised Sheet No. 72 and Original Sheet No. 72-A of its FPC Gas Tariff, First Revised Volume No. 1.

will of course consider the past and planned disposition of volumes by the customers when ruling upon allocations for the various customers, but after allocation among United's customers, we leave for the states or other local bodies the job to oversee the distribution of that gas by the customers at the local level. This proposed language is not an integral part of United's curtailment plan: the later disposition by one of United's customers of volumes sold by United, or the purchase by United's customers of gas originating from United, does not affect United's ability to limit the total volume of gas delivered by it. There is no showing that this proposed tariff language would have the slightest beneficial effect on the gas supply of a single customer of United.

PENDING MOTIONS

Also before us are four motions. One was filed on August 12, 1971, by Marquette Cement Manufacturing Company and Container Corporation of America (Marquette and Container Corp.) to sever for immediate consideration an issue regarding the validity of United's establishment of a new low priority Category V in its priority list for curtailments.[17] In the alternative, Marquette and Container Corp. asks that, if the Commission permits Category V to become effective, that it do so conditionally upon an express agreement by United to refund, if the Commission ultimately disapproves this category, the differences between the rates now paid under contract and the higher contract rates paid by any customer pursuant to a contract entered into as a result of this priority system. Four answers representing eight direct customers of United were filed in support of the motion. United opposes the motion.

[17] This Category consists of those customers, other than domestic, purchasing gas at the city gate 100% load factor zone rate.

In light of our disposition regarding Category V above, the motion of Marquette and Container Corp. is now moot and should be dismissed.

Two motions were also filed requesting enlargement of the suspension period of United's proposed tariff sheets which were filed May 17, 1971, in Docket No. RP71-120; one by Gulf States Utilities Co. on September 9, 1971, and one by New Orleans Public Service Inc. on September 13, 1971.[18] Gulf States also requests that we defer the effective date of United's tariff until 30 days after the Commission passes upon the issues. Mississippi Power & Light answered in support of these motions on September 15, 1971. Our disposition above regarding the propriety of Category V removes the most significant basis and reason for these two motions. In addition, we have previously stated in our Order of July 2, 1971, in these proceedings, which directed interim enforcement of the curtailment program, United should be required to carry out its filed curtailment plan pending a decision on the issues. We do not defer from that principle, and the motions must be denied.

A fourth motion, filed on August 13, 1971, by International Paper Company and Scott Paper Company seeks enlargement of the extension period of that portion of United's proposed tariff that would prohibit a customer from reselling gas to other United customers to offset gas curtailed by United.[19] This provision was filed by United in Docket No. RP71-120. Again, our action above moots this request and the motion should be dismissed.

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[18] Gulf States filed a follow-up motion for expeditious consideration on September 15, 1971.

[19] See United's Third Revised Sheet No. 72 and Original Sheet No. 72-A of its FPC Gas Tariff, First Revised Volume No. 1.

The Commission further finds:

(1) United Gas Pipe Line Company is engaged in the transportation and sale for resale in interstate commerce of natural gas and is a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission in its order of November 10, 1942, in Docket No. G-232, 3 FPC 863.

(2) Plenary jurisdiction resides within this Commission to accept, modify, and/or approve the curtailment plans proposed by United Gas Pipe Line Company or any other jurisdictional pipeline company relating to gas transported both to resale and direct sale customers.

(3) The curtailment priority Category V set forth on the proposed Third Revised Sheet No. 72 should be rejected as being an improper provision in a curtailment plan.

(4) The proposed language on Third Revised Sheet No. 72 and Original Sheet No. 72-A stating, "Furthermore, no customer so required to curtail will obtain gas to offset such curtailment from a supplier who obtains such offset gas either directly or indirectly from Seller, nor shall any customer of Seller sell gas to anyone to offset gas curtailed in accordance herewith" should be rejected as implying an extension of Commission jurisdiction over the local distribution of gas.

(5) The petition for a declaratory order in Docket No. RP71-99 should be dismissed.

(6) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the motion of Marquette Cement Manufacturing Company and Container Corporation of America, filed August 12, 1971, to sever and decide whether United's proposed curtailment priority classification, Category V, is proper, be dismissed.

(7) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the motions of Gulf States Utilities Company, filed September 9, 1971, and of New Orleans Public Service Inc., filed September 13, 1971, to enlarge the suspension period for the effective date of United's proposed tariff sheets, First Revised Sheet No. 71, Third Revised Sheet No. 72, and Original Sheet No. 72-A, be denied.

(8) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the motion of International Paper Company and Scott Paper Company filed August 13, 1971, for enlargement of the suspension period of a portion of United's proposed tariff, be dismissed.

(9) The motion for oral argument filed September 22, 1971, by the State of Louisiana, the Louisiana Municipal Association, and the Parish of Cameron, Louisiana, should be denied.

The Commission orders:

(A) Issues in these consolidated proceedings not here decided are remanded to the Presiding Examiner for his initial decision regarding the proper interpretation and implementation of United's proposed curtailment plans, and the reasonableness thereof as set forth in both its petition for declaratory order, as amended and supplemented, in Docket No. RP71-29, and its filing, as amended and supplemented, pursuant to our Order No. 431, in Docket No. RP71-120. Such initial decision should also include findings concerning the environmental impact of United's curtailments.

(B) The proposed language on Third Revised Sheet No. 72 relating to Category V, and the proposed language on Third Revised Sheet No. 72 and Original Sheet No. 72-A relating to the offsetting of curtailed gas, as quoted herein,

are rejected. United Gas Pipe Line Company shall file new proposed sheets by November 2, 1971, deleting that language from its tariff.

(C) The petition for a declaratory order filed by United Gas Pipe Line Company in Docket No. RP 71-99 is dismissed.

(D) The motion of Marquette Cement Manufacturing Company and Container Corporation of America is dismissed.

(E) The motions of Gulf States Utilities Company and New Orleans Public Service Inc. are denied.

(F) The motion of International Paper Company and Scott Paper Company is dismissed.

(G) The motion for oral argument by the State of Louisiana, the Louisiana Municipal Association, and the Parish of Cameron, Louisiana, is denied.

By the Commission.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CERTIFICATES — DIRECT SALE CONTRACTS — GAS SUPPLY — JURISDICTION — PUBLIC INTEREST — SERVICE — TARIFFS — TRANSPORTATION IN INTERSTATE COMMERCE

Before Commissioners: JOHN N. NASSIKAS, *Chairman;* JOHN A. CARVER, JR., ALBERT B. BROOKE, JR., PINKNEY WALKER, AND RUSH MOODY, JR.

UNITED GAS PIPE LINE COMPANY
Docket Nos. RP71-29, RP71-120, RP71-99

OPINION No. 606-A

OPINION AND ORDER DENYING REHEARING AND DENYING MOTIONS TO REOPEN RECORD

(Issued December 3, 1971)

Nine applications and petitions for rehearing and clarification of the Commission's Opinion No. 606 and Order issued October 5, 1971, have been filed by twelve intervenors in this proceeding.[1] In addition, the State of Louisiana, *et al.* has petitioned for a reopening of the record.

REQUEST FOR REHEARING AND MODIFICATION

The petitions requesting rehearing and modification do not convince us that rehearing should be granted or that

[1] In alphabetical order they are: Gulf States Utilities Company; International Paper Company; Louisiana Power & Light Company; Mississippi Power & Light Company; Mississippi Power Company; Mobile Gas Service Corporation, jointly with Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District; New Orleans Public Service Inc.; Olinkraft, Inc.; and State of Louisiana, jointly with Louisiana Municipal Association, and Parish of Cameron, Louisiana.

our Opinion No. 606 should be modified. Thus we view our orders in Opinion No. 606 and on rehearing here to be final and fully reviewable upon the matters decided therein.

Several petitioners contend the Commission erred in finding it has plenary jurisdiction over curtailment plans of jurisdictional pipelines.[2] No arguments not previously considered concerning our authority under the Natural Gas Act were raised by the petitioners except that the State of Louisiana claims that there is no express grant of authority in the Natural Gas Act permitting the Commission to allocate a jurisdictional pipeline's scarce gas supplies to even resale customers and says Commission action is "without the benefit of any undisputed authority or congressional standards."[3] That contention was settled adversely to Louisiana's position in *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 232 F.2d 467 (3rd Cir. 1956), *cert. den.*, 352 U.S. 891 (1956). In that case the Commission refused to allow Panhandle to use its interruptible gas to make direct industrial sales instead of selling such gas to its resale customers. The court affirmed the Commission's order, holding that the Commission has the power under the Act to control all deliveries of gas so as to prevent Panhandle from discriminating against its existing customers. The court pointed out that although the States may fix the rates at which gas is sold to direct-sale customers, the State "* * * tribunals in turn have no warrant to interfere in the Commission's allocations" (232 F.2d at 473).

Our Opinion No. 606 made clear that the basis of our jurisdiction to act over curtailments, respecting not only

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[2] Gulf States Utilities Company, Louisiana Power & Light Company, Mississippi Power and Light Company, Mississippi Power Company, Mobile Gas Service, *et al.*, New Orleans Public Service Inc., and State of Louisiana.

[3] Mobile Gas Service Corp., *et al.*, also discuss this in their petition for rehearing.

resales but direct-sale customers as well, derives from Sections 1(b), 4, 5, 7, and 16 of the Natural Gas Act. Decisions in proceedings before the Supreme Court and other appellate courts, the history of natural-gas regulation during a previous period of curtailments, and the basic purposes and policies of the Natural Gas Act confirm this authority, as detailed in Opinion No. 606.

Mississippi Power Company argues that if curtailment plans do not directly apply to rates and charges they should not be a part of United's tariff. Our Regulations require the filing of additional information regarding the classifications and practices of a pipeline company affecting services as well as those affecting rates and charges,[4] and the Commission has authority to prevent undue discrimination. See *Panhandle Eastern Pipe Line Co.* v. *F. P C.*, 324 U.S. 635, 647 (1945). The form of filing is not the controlling consideration.

Several petitioners[5] request a rehearing or clarification of our ruling and rationale finding as unnecessary, but permissible, United's proposed language regarding substitute fuel clause adjustments. All concur in our rejection of that language and in our dismissal of United's petition in Docket No. RP71-99, but object to our bases for doing so. In clarification, this Commission has the responsibility and the authority to protect all consumers from efforts by pipelines to grant preferences in service to particular customers or classes of customers in times when gas shortage precludes fulfillment of all contracts for delivery of gas. A claim of preference in service directly or, in the case of substitute fuel clauses, indirectly, cannot operate to deprive

[4] Sections 154.1 and 155.1 of the Commission's Regulations.

[5] Gulf States, International Paper, Mississippi Power & Light Company, Mississippi Power Company, Olinkraft, Inc., and State of Louisiana.

this Commission of authority to assure fair and equitable curtailment plans. The pipeline companies cannot be faced with the dilemma of providing nondiscriminatory service as ordered by the Commission and at the same time incur liability for breach of contracts which grant discriminatory preferences, directly or indirectly. Thus, the Commission's authority to preclude undue preferences and discriminations in service operates to preempt any contract provisions inconsistent with the exercise of that authority as not being in the public interest.

International Paper argues that no question is involved of specific relief under the substitute fuel adjustment clauses in United's contracts and that therefore the cases relied upon by the Commission are inapposite.[6] International Paper misconstrues our purpose for the citations. They serve to point out that this Commission has the authority to issue orders (such as orders approving a curtailment plan) to carry out the purposes of the Natural Gas Act regardless of existing contractual commitments (such as direct sales commitments) of the natural-gas companies subject to our jurisdiction. While those cases are related to contracts involving sales for resale, we believe, as Opinion No. 606 made clear, that the principle they stand for is equally applicable to direct sales. *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 324 U.S. 635, 647 (1945).

CONSIDERATION OF OTHER ISSUES

Louisiana asks that the proceedings be reopened for receipt of further evidence to determine whether United either deliberately or negligently brought its systemwide

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[6] *Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (6th Cir. 1949); *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942 (6th Cir. 1949); and *Permian Basin Area Rate Cases*, 390 U.S. 747, 748 (1968).

gas shortage upon itself. This question was already briefed by the parties and the question was remanded with other issues to the Examiner for his decision.

Louisiana also asks us to specify that the remand to the Examiner be broadened to include issues raised in Louisiana's reply brief concerning whether United's curtailment classifications should also distinguish between full and partial requirements customers and whether they should distinguish between localities within Louisiana and localities elsewhere. These issues are questions relating to the propriety and implementation of United's curtailment plan — questions which were specifically remanded to the Examiner for his decision.[7] The arguments of Louisiana are thus available to the Examiner for his consideration.

Louisiana further requests that the remand be broadened to consider whether this Commission has abused its discretion in approaching the national gas shortage on a pipeline-to-pipeline basis rather than upon a nationwide basis which would permit consideration of equities between gas-producing States and gas-consuming States, and whether the failure to conduct a nationwide allocation study to allocate gas between States is prejudicial to Louisiana localities. Without reaching the question of the extent of our jurisdiction to allocate the gas supply on a nationwide basis or after a nationwide allocation study, we have determined that the proper scope of this proceeding is that set forth in Opinion No. 606.

Louisiana additionally asks that the record be reopened pursuant to our direction to the Examiner in Opinion No.

[7] Louisiana requests that official notice be taken of its appendices to its reply brief. Because we leave for the Examiner to consider the relevance of Louisiana's contentions, we believe he should rule upon that request since he will be better able, at this time, to assess their materiality and relevance to these proceedings.

606 to make findings concerning the environmental impact upon the health of Louisiana residents of United's curtailments. Louisiana avers that presently the record evidence is limited to the economic impact of curtailments. Louisiana's request is more properly directed to the Examiner who now has the proceedings before him as a result of our remand in Opinion No. 606 of the issues not there decided.

Olinkraft, Inc., notes that our Opinion No. 606 did not correctly state its position regarding the interim settlement approved on December 29, 1971. To the extent that the transcript references cited by Olinkraft indicate a contrary position, we so recognize that as Olinkraft's position at that time.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the applications filed by the above-named petitioners present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 606 and accompanying order of October 5, 1971, except as that Opinion has been clarified above.

The Commission orders:

The applications for rehearing of Opinion No. 606 filed by the above-named petitioners are denied.

By the Commission.
Commissioner Carver dissenting filed a separate statement appended hereto.

(Seal)

KENNETH F. PLUMB,
Secretary.

UNITED GAS PIPELINE COMPANY

DOCKET NOS. RP 71-29, RP 71-120, RP 71-99

(Issued December 3, 1971)

CARVER, Commissioner, *dissenting:*

By reason of absence, I did not participate in Opinion 606. I dissent to the order denying rehearing principally because the Commission has passed up an opportunity to correct some of the extravagances of jurisdictional assertions therein, a deficiency not cured by the circular statement that ". . . we have determined that the proper scope of this proceeding is that set forth in Opinion 606."

I continue in the conviction, expressed principally in dissenting statements over the past years, that the Natural Gas Act and the Federal Power Act delimit this Commission's jurisdiction according to a fair reading of their terms. See *Florida Power & Light Company,* Docket No. E-7210, 37 FPC 544, March 20, 1967, at p. 556; *Algonquin Gas Transmission Company, et al.,* 37 FPC 1128, June 27, 1967, at p. 1146; *Ohio Power Company, et al.,* 38 FPC 881, November 3, 1967, at p. 890; *Alabama-Tennessee Natural Gas Company, et al.,* 38 FPC 1069, November 30, 1967, at p. 1082; *Hugoton Production Company,* 41 FPC 490, April 17, 1969, at p. 504; *William Harvey Denman, Trustee, et al v. J. M. Huber Corporation,* 42 FPC 164, July 23, 1969, at p. 173; Reliability of Electric and Gas Service, Docket No. R-405, Policy Statement, Notice of Investigation and Proposed Rulemaking with Respect to Developing Emergency Plans, 44 FPC ....., November 4, 1970; *Arkansas Louisiana Gas Company,* Docket No. RP 71-122, Order Granting Emergency Modification of Curtailment Plan Pending Final Commission Decision, issued November 30, 1971.

On a separate but related point, I also would grant the relief now requested by International Paper and Mississippi Power and Light, asking moderation of the declaration that the Commission's order "would be an absolute defense for Unifed against all claims for specific performance, damages, or other requests for relief." This is a self-serving dictum not binding on anyone, least of all the courts who must ultimately rule upon the effect of our orders. I very much doubt that the judicial branch can be foreclosed from awarding damages for breach of a substitute fuel clause in a contract which neither required nor received the approval of this Commission, to take the one example cited by International Paper. A proper sense of comity in judicial-administrative relations calls for an abandonment of this fruitless attempt to delimit judicial remedy.

/s/ JOHN A. CARVER, JR.
John A. Carver, Jr.,
Commissioner

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CERTIFICATES — COST OF SERVICE — DELIVERABILITY — END USE — FINANCIAL AND ECONOMIC FEASIBILITY — GAS SUPPLY — INTERCONNECTION — JURISDICTION — MARKETS — SALES FOR RESALE — TRANSMISSION FACILITIES — VOLUMETRIC LIMITATIONS

Before Commissioners: JOHN N. NASSIKAS, *Chairman;* JOHN A. CARVER, JR., ALBERT B. BROOKE, JR., PINKNEY WALKER, and RUSH MOODY, JR.

UNITED GAS PIPE LINE COMPANY) DOCKET NO. CP71-89

OPINION NO. 610

OPINION AND ORDER FINDING JURISDICTION AND REMANDING PROCEEDING FOR RECEIPT OF ADDITIONAL EVIDENCE

(Issued February 9, 1972)

NASSIKAS, Chairman:

1. United Gas Pipe Line Company (United) filed on October 1, 1970, an application pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing certain operations, sales and services. Specifically, United seeks to have added to its existing certificated system two large service areas in Louisiana and a few sales for resale and services in Texas. United avers that it now seeks to obtain a certificate authorizing the aforementioned operations, sales, and services because of the Commission's holding in the *Florida Parishes* case[1] to the effect that the commingling in trans-

[1] *United Gas Pipe Line Co.*, 30 FPC 560 (1963), *aff'd sub nom. Louisiana Public Service Commission* v. *F. P. C.*, 359 F.2d 525 (5th Cir. 1966), *cert. denied*, 385 U.S. 833 (1966).

mission facilities of gas moving in interstate commerce with local or intrastate gas makes the operation of the facilities, as well as the sales and services rendered by means of such facilities, subject to the Commission's jurisdiction.

2. A hearing was held in this proceeding from June 7, 1971, through June 18, 1971.[2] At the conclusion of the hearing United moved for omission of the intermediate decision procedure and that motion was granted by the Commission's order issued July 2, 1971. Thereafter, 17 parties filed initial briefs and 16 submitted reply briefs.[3] Since this order is in the nature of an interim decision pending the receipt of additional evidence upon remand, which we order herein, the arguments of the parties will not be referred to herein except in a few minor respects. The oral arguments requested by some parties are denied be-

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[2] The following parties have intervened in the proceeding: Algonquin Gas Transmission Company; Boise Southern Company; The Parish of Cameron, Louisiana; Town of Carencro, Louisiana; Cities Service Oil Company; Consolidated Gas Supply Corporation; Gulf States Utilities Company; Humble Oil & Refining Company; Laclede Gas Company; State of Louisiana; Louisiana Gas Service Company; The Louisiana Municipal Association; Louisiana Power & Light Company; The Louisiana Public Service Commission; Mid Louisiana Gas Company; The Public Service Commission of the State of Missouri; Mobile Gas Service Corporation, Mississippi Valley Gas Company and Clarke-Mobile Counties Gas District; Monsanto Company; National Gypsum Company, Scott Paper Company and Stauffer Chemical Company; The City of New Orleans, Louisiana; New Orleans Public Service Inc.; The Public Service Commission of the State of New York; The Ohio Fuel Gas Company and The Manufacturers Light and Heat Company; Shell Oil Company; Southern Natural Gas Company; Texaco Inc.; Texas Eastern Transmission Corporation; Texas Gas Transmission Corporation; Towns of Walker and Livingston, Louisiana; and United Gas, Inc.

[3] On November 2, 1971, the State of Louisiana, Louisiana Municipal Association and Parish of Cameron, Louisiana, filed a motion for permission to file a late reply brief submitted therewith. We have accepted the brief for filing and have considered the arguments made therein.

cause the deficient record would make the holding of oral argument nonproductive at this stage of the proceeding.

JURISDICTIONAL ISSUE

3. The first issue to be resolved is whether the Commission has jurisdiction over the operation of the facilities involved and over the sales and other services being rendered by means of such facilities. That question must be determined on the basis of the gas flow in the areas concerned as shown by the evidence.

(1) Description of Texas Facilities, Sales, and Services

4. United's evidence shows that it has already received a certificate from the Commission authorizing the construction and operation of all the transmission facilities which it owns and operates in its Victoria Division of Texas. The Victoria Division extends along the Texas Gulf Coast from a point near Agua Dulce to a point northwest of Houston. United's testimony shows that it has never obtained a certificate authorizing the sale of gas from the Victoria Division to distributors which resell the gas in 14 communities, nor has United ever obtained a certificate authorizing it to deliver gas to the 7 direct industrial customers which it serves from its facilities in the Victoria Division.

5. United's flow diagrams show that United has a single integrated pipeline system in the Victoria Division. Gas is delivered into the system from numerous gas fields and travels out of the State of Texas in interstate commerce except for deliveries made from the interstate facilities to the 14 communities and 7 direct-sale customers which United seeks authorization to serve.

(2) **Determination of Jurisdiction Regarding Victoria Division**

6. There appears to be no doubt but that the Commission has jurisdiction over the 14 sales for resale and the transportation and delivery of gas to the seven direct-sale customers of the Victoria Division. In *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965), the Supreme Court affirmed the Commission's assertion of jurisdiction over the sale and transportation of gas in *Montana-Dakota Utilities Co.*, 30 FPC 200 (1963). In the *Amerada* case the interstate pipeline company purchased gas at the tailgates of three gasoline plants within the State of North Dakota and commingled in the same pipeline gas which was contractually destined for use only within the State with gas purchased from the three plants for use outside of the State. The Commission held that the commingling of the so-called intrastate gas with the gas moving out of the State converted all the sales from the gasoline plants into sales for resale in interstate commerce subject to the jurisdiction of the Commission. In the *Florida Parishes* case *supra* the Commission stated that "* * * The removal of a portion of the gas thus flowing in interstate commerce does not change the gas removed from the stream into intrastate gas" (30 FPC at 563).

7. Since the evidence in this proceeding shows that United purchases gas from many sources for transportation and resale in interstate commerce and commingles the gas traveling to markets outside the State with gas delivered to customers within the State, all sales for resale and deliveries to direct-sale customers within the State are subject to the Commission's jurisdiction under the rationale expressed by the Commission in the *Florida Parishes* and *Amerada* cases.

8. However, the Commission at this time does not believe it would be in the public interest to grant a certificate with respect to the Victoria Division because United's evidence is unclear in some respects. Specifically, United did not make it clear in its exhibits whether it is now rendering some service pursuant to Commission authorization and wishes to have additional sales for resale and services certificated, or whether it is now rendering no service in the Victoria Division pursuant to Commission orders and now wishes to obtain a certificate covering all sales for resale and services being performed in the Victoria Division. United's evidence should also clarify whether sales to pipeline companies shown on the flow diagrams have been certificated, whether any of the other deliveries shown on the flow diagrams have heretofore been certificated, and whether the flow diagrams reflect all services and sales being rendered, or only those for which a certificate is requested. United's evidence in the remanded proceeding should show whether the Victoria sales and services have heretofore been included as requirements to be met when presenting gas reserve and deliverability data to the Commission in certificate cases or in the preparation of its Form 15. Additionally, United should present evidence with respect to alternate sources of gas supply for the Victoria customers.

(3) Description of Louisiana Facilities, Sales, and Services

9. The certificate which United seeks for Louisiana facilities, sales, and services would not only cover authorization to make sales for resale and deliveries of gas to direct-sale customers, but would also grant authority to operate the facilities by means of which such sales and services are rendered.

10. The facilities involved are situated in that portion of United's service area known as the New Orleans Division which is located entirely in Southern Louisiana south of Marksville, Louisiana. The New Orleans Division is further subdivided into two districts called the Lafayette District and the New Orleans District. The Lafayette District lies in the western part of Southern Louisiana west of Baton Rouge and Napoleonville, while the New Orleans District is situated in the eastern part of Southern Louisiana and includes Baton Rouge and Napoleonville.

11. Since United operates an existing interstate pipeline system in Southern Louisiana under certificates issued by the Commission as well as the facilities comprising the Lafayette and New Orleans Districts, United's evidence includes maps which use three colors to differentiate the various facilities and service areas. The certificated transmission lines are shown in black, the Lafayette District facilities are depicted in purple, and the New Orleans facilities are outlined in green. Throughout this opinion the purple facilities will be referred to as the Lafayette facilities and the green facilities will be referred to as the New Orleans facilities. United's application requests that the Commission certificate the Lafayette and New Orleans facilities and all sales and services rendered by means of such facilities.

12. Although United's Exhibit 1 shows letter designations from "A" through "W" to indicate that there are 24 points where interstate gas enters the Lafayette and New Orleans facilities, none of those interconnections has ever been certificated by the Commission. Thus, the facts which must be used for determining jurisdiction are based on unauthorized flows of interstate gas into and out of the Lafayette and New Orleans facilities. Diagrams showing the flow of gas on an annual basis (for the 12 months ending December 31, 1969) were presented by United in support of

its belief that the Lafayette and New Orleans facilities are now integrated with its interstate system. The Commission has examined both the annual flow diagrams and the flow diagrams for the peak day of January 6, 1970, which were received in evidence as Item E (Tr. 558). In addition, the Commission has taken official notice of United's flow diagrams for the peak day of March 3, 1971, which were filed July 7, 1971, pursuant to Section 260.8 of the Commission's Regulations under the Natural Gas Act.

13. While United's Exhibit 1 shows 24 points indicating where interstate and uncertificated gas supplies may be commingled, scrutiny of the 12 points which were discussed in the cross-examination of United's witnesses is sufficient to establish that the operation of United's Lafayette and New Orleans facilities are presently subject to the Commission's jurisdiction.

(a) **Flow of Interstate Gas in Lafayette Facilities**

14. At point "A" on Exhibit 1 there is an interconnection between an interstate transmission line of Texas Eastern Transmission Corporation and a Lafayette pipeline lying north of the City of DeQuincy. Since this interconnection is a point at which United exchanges gas with Texas Eastern, the flow diagram shows no annual volumes to be entering United's system, but on the peak day of March 3, 1971, Texas Eastern delivered 105,173 Mcf of which approximately half traveled southeasterly toward the Lake Charles area and the remaining volume was transported northwesterly into the Leesville area.

15. Point "B" on Exhibit 1 is located at an interconnection between Texas Gas Transmission Corporation's interstate line and a Lafayette pipeline near Iowa, Louisiana. On an annual basis Texas Gas delivered 1,371,681 Mcf to United at that point and on the peak day of March 3, 1971, United received 17,636 Mcf from Texas Gas at that point. The gas

was commingled with intrastate gas and sold to customers in the Lake Charles area.

16. Point "C" is located on the western boundary of the State of Louisiana southeast of Beaumont, Texas. At that place a Lafayette pipeline interconnects with Pennzoil Pipeline Company's facilities which transport gas into Texas. On an annual basis 24,254,556 Mcf are delivered to Pennzoil and on the peak days of March 3, 1971, and January 6, 1970, volumes of 1,075 Mcf and 58,399 Mcf, respectively, were delivered to Pennzoil for transportation out of the State of Louisiana.

17. At point "D" United receives gas in the East Cameron Area from Tennessee Gas Pipeline Company's interstate pipeline and such gas is transported along with locally-produced gas to consumers in the Lake Charles area. On an annual basis Tennessee delivered 1,357,396 Mcf and on the peak days of March 3, 1971, and January 6, 1970, Tennessee delivered 24,079 Mcf and 41,323 Mcf, respectively.

18. At point "H" gas produced in the Lawson field area is delivered into a pipeline extending from Lafayette to Bancroft. Although all of the gas received at this point is produced in Louisiana, the gas is split at the point of delivery so that out of 16,594,766 Mcf received on an annual basis, 9,717,494 Mcf are transported easterly for delivery into one of United's interstate pipelines transporting gas out of the State, while the remainder is transmitted to a market in the Leesville area. On the peak day of March 3, 1971, 38,138 Mcf entered the line and all of it was transported out of the State. Of the 38,429 Mcf delivered from the Lawson field on the peak day of January 6, 1970, 21,395 Mcf were transported out of the State while the remainder was consumed in local markets.

19. At point "O" Tennessee delivers gas to United from its interstate line near Iowa, Louisiana. On an annual basis Tennessee delivered 22,138,127 Mcf and on the peak days of March 3, 1971 and January 6, 1970, Tennessee delivered 47,919 Mcf and 117,173 Mcf, respectively. The gas is transported by United with locally-produced gas and consumed by customers in the Lake Charles area.

(b) **Flow of Interstate Gas in New Orleans Facilities**

20. At point "I" United receives gas from producers in the Bastian Bay area whose sales have been certificated for interstate commerce. The gas enters one of United's major certificated interstate gas pipelines extending toward Lirette, Louisiana, and also enters one of United's 20-inch supply lines which transports gas to New Orleans. On an annual basis the 20-inch line received 3,286,407 Mcf from the Bastian Bay area and on the peak days of March 3, 1971, and January 6, 1970, received 72,990 Mcf and 56,182 Mcf, respectively.

21. At point "J" United receives gas from producers in the Bay Marchand, Calliou Island, and Bayou Jean la Croix fields. On an annual basis United received 20,414,367 Mcf from those fields of which 2,119,631 Mcf were transported in United's pipeline extending to the New Orleans area while the remainder of the gas was transported to market in United's certificated Lirette-Mobile interstate pipeline. On the peak day of January 6, 1970, 66,432 Mcf were received of which 16,437 Mcf entered the New Orleans pipeline and the remainder flowed into the Lirette-Mobile line. On the peak day of March 3, 1971, 47,116 Mcf were received and all of the gas on that day entered the Lirette-Mobile pipeline.

22. At point "K" United receives gas from producers in the Houma and other fields. The stream is split with

some gas entering a 12-inch line extending toward New Orleans while the bulk of the gas travels in United's certificated Lirette-Mobile interstate pipeline. On an annual basis 13,481 Mcf entered the New Orleans pipeline and on the peak days of March 3, 1971, and January 6, 1970, no gas entered the New Orleans facilities.

23. At point "L" United's certificated Kosciusko interstate pipeline delivers large volumes of gas into local facilities for transportation to Gulf States Utilities Company's Willow Glen electric generating station which is located south of Baton Rouge. On an annual basis 38,177,591 Mcf were delivered at that point and on the peak days of March 3, 1971, and January 6, 1970, United delivered 64,017 Mcf and 15,744 Mcf, respectively, for consumption in the power plant.

24. Point "M" is located very close to point "L", but the gas flows from the certificated interstate line into an uncertificated pipeline extending toward the Baton Rouge area. On an annual basis 2,055,759 Mcf were delivered and on the peak days of March 3, 1971, and January 6, 1970, 52,762 Mcf and 64,868 Mcf, respectively, were delivered.

25. At point "X" United receives gas produced in the De Large field area. After receipt, the gas stream is split with gas entering both the interstate and local markets. On an annual basis 2,773,124 Mcf were received of which 157,426 Mcf were consumed in the Dulac area. On the peak days of March 3, 1971, and January 6, 1970, 5,490 Mcf and 9,061 Mcf were received with 77 Mcf and 145 Mcf, respectively, being consumed in local markets while the remainder entered interstate pipelines.

(c) **The Unauthorized Gas Flows Establish Jurisdiction.**

26. The foregoing description of the flow of interstate gas in United's Lafayette and New Orleans facilities shows beyond any doubt that United's introduction of substantial quantities of gas into those uncertificated facilities from its interstate gas sources is a sufficient commingling of interstate and uncertificated gas supplies to bring the operation of the Lafayette and New Orleans facilities, together with the sales and services made from those facilities, within the Commission's jurisdiction under the Natural Gas Act.

27. As indicated in the foregoing discussion of delivery points, on the peak days of 1971 and 1970, interstate volumes of 189,846 Mcf and 153,376 Mcf, respectively, flowed into the New Orleans District facilities. Those volumes would be adequate to heat well over 100,000 single-family residences on a cold day.

28. A *de minimis* argument is advanced by certain parties with respect to commingled gas in that portion of the New Orleans District, referred to as the Green System-East, located east of the Napoleonville-Kosciusko line. New Orleans Public Service Inc. (NOPSI) offered Exhibit 22 showing that deliveries of interstate gas by United into the Green System-East represented 7.79 percent of peak day requirements and 2.39 percent of annual requirements for the 12 months ended July 31, 1970.

29. A comparison of the adjusted flow diagrams upon which Exhibit 22 is based[4] with United's actual flow data on file with the Commission, referred to previously, shows

[4] Exhibit 22 indicates that the source for the data shown therein was United's response to FPC Staff Request No. 38 in Docket No. RP71-41, prepared for United's rate proceeding in that docket, which consisted of flow diagrams captioned "adjusted".

that the actual peak-day deliveries from gas supply sources differ from the adjusted flows in almost every instance.

30. At Bastian Bay (point "I") where interstate gas entered the Green System-East the actual volumes shown for the peak day, January 6, 1970, exceeded the adjusted flow by 19,489 Mcf. This increases the percentage of peak-day injections of interstate gas into the Green System-East from 7.79 percent to 10.7 percent. A review of the same data with respect to the annual volumes of interstate gas flowing into the Green System-East indicates that the 2.39 percent should be increased to about 3.4 percent. We find that these quantities are not *de minimis*.

31. Furthermore, United projects the peak-day demand in the New Orleans-Baton Rouge area to be at a level of 1,002,000 Mcf during the 1971-72 winter period with a projected intrastate supply of only 413,000 Mcf (Tr. 91-92). Accordingly, United shows that there is a peak-day deficiency in gas supply of 598,000 Mcf which it contends must be supplied by interstate sources. On the basis of this evidence, there would be a substantial gas supply deficiency in the City of New Orleans area, within the Green System-East, of approximately 448,000 Mcf per day during the 1971-72 winter heating season which would be met with volumes from interstate sources transported through certificated interstate facilities. Moreover, United contends that this deficiency[5] will increase for the peak day of the 1972-73

[5] A question has been raised as to whether a producer affiliate of United has gas available, which can be delivered into either interstate or uncertificated facilities, in sufficient quantities to meet the New Orleans District's deficiencies and thereby obviate the need for United to obtain gas from its interstate sources. Even assuming that the Commission sanctions such an arrangement, we find no evidence to support that proposition; to the contrary, the evidence in the record indicates that on peak days gas from interstate sources in volumes of about 609,000

winter heating season and that it will be necessary for United to increase its deliveries into the Green System-East if that system is to remain on a parity with all other systems.[6]

32. Mr. Echterhoff testified at Tr. 91-92 that the peak-day deficiency of intrastate reserves for meeting the needs of the New Orleans District would be 684,000 Mcf in 1972-73, *i.e.*, the requirements were 1,018,000 Mcf and the "intrastate" reserves were 334,000 Mcf. Thus, 67.2 percent of the peak-day requirements would have to come from *interstate* sources.

33. If the Green System-East (or New Orleans area by itself) is isolated from the Willow Glen-Baton Rouge area, the needs for the New Orleans area by itself amount to 542,000 Mcf. The deficiency would be made up by obtaining interstate gas from the Bastian Bay-Lirette-Mobile system.

34. Testimony in the record of the case reveals that the peak-day deficiency on the Green System would result in approximately 70 percent curtailment of the Green System, including the New Orleans distributor — the company upon which human needs customers depend. To test this testimony, we have taken notice of the filings required by our regulations.

35. The peak-day flow diagrams filed by United pursuant to Section 260.8 of the Commission's Regulations as well as the flow diagrams in the record of this case reveal the flow of interstate gas into United's uncertificated facilities. We

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Mcf will have to be introduced into the New Orleans District. To test the possibility of obtaining gas in those quantities from Lirette sources, we have examined both the Form 15 and System Flow Diagram reports filed pursuant to our regulations. The data from those sources show that the peak-day flows from Lirette to *any* destination would fall short of meeting the requirements by several hundred thousand Mcf.

[6] See also Exhibits 3 and 34.

examined the peak-day flow diagrams for several reasons. First, it is important in this proceeding to understand the impact on United's existing interstate customers resulting from deliveries of gas to the New Orleans and Lafayette Districts on peak days because those volumes are illustrative of the extent of curtailments to United's existing customers which will be necessary in order for the uncertificated markets to be served on cold days. Second, Section 157.14(a)(8) requres the submission of peak-day flow diagrams as a part of all certificate applications in order to show the applicant's ability to serve its proposed customers on the day of maximum demand. Third, the Commission normally examines peak-day flows in determining jurisdiction. See, *e.g., Florida Parishes, supra,* 30 FPC at 564, and *Amerada, supra,* 30 FPC at 203. Fourth, some of the parties had relied on Exhibit 22 showing peak-day flows based on flow diagrams which were introduced in United's rate proceeding in Docket No. RP71-41, and it was appropriate that the Commission examine peak-day flow diagrams which reveal actual flows of gas on the peak day rather than the adjusted flows which were utilized in the flow diagrams submitted in the rate proceeding.

36. We have examined all available data in finding that the uncertificated facilities, as well as the sales for resale and transportation services rendered thereby, are subject to the Commission's jurisdiction. In addition, the annual flow diagrams which were a part of the record reveal that gas flows out of the Green System-East.

37. The estimony (Tr. 326) indicates that point "M" is at the extreme west end of the Green System-East. At that point 8,256,920 Mcf left the Green System-East and entered the Green-System West and of that volume 6,879,259 Mcf were transported toward Willow Glen while the remaining 1,377,661 Mcf were transported toward Baton Rouge and

commingled with 2,055,759 Mcf of interstate gas delivered into the Green System-West from the Napoleonville-Kosciusko interstate pipeline. The commingled stream of Green System-East and interstate gas thereafter was used to serve markets in Louisiana and ultimately provided 2,054,190 Mcf at point "U" for delivery to Mid Louisiana Gas Company's interstate pipeline which extends out of the State of Louisiana.

38. The importance of examining both annual and peak-day flow diagrams becomes obvious from the foregoing illustration because the peak-day flow diagram for March 3, 1971, shows that 22,811 Mcf were transported out of the Green System-East into the Green System-West but were thereafter commingled with interstate gas and wholly used in the Willow Glen area. Although 38,557 Mcf were delivered to Mid Louisiana on that day at point "U", none of the Green System-East gas is shown to be flowing beyond the Willow Glen pipeline. Of course, gas does flow out of the Green System-East on both a peak-day and an annual basis, but the Green System-East gas does not appear to flow out of the State of Louisiana except on an annual basis.

39. We have considered the volumes delivered at all points in our discussion with respect to the flow of gas in the Lafayette and New Orleans Districts. Our finding of jurisdiction was based on the flow of interstate gas in and out of the jurisdictional uncertificated facilities. It is unnecessary for us to separate interconnection points in the Green System-East from those related to the Green System-West because the New Orleans District is situated in the eastern part of Southern Louisiana and *includes* Baton Rouge and Napoleonville.

40. As previously stated, we have considered the actual peak-day volumes as set forth in United's flow diagrams filed pursuant to Section 260.8 of our Regulations and the

adjusted volumes which were shown on the flow diagrams presented in United's rate case in Docket No. RP71-41 that were used by the witness sponsoring Exhibit No. 22 from which the 2.39 percent commingling figure is obtained.

41. In addition to the adjusted volumes used in United's rate proceeding in Docket No. RP71-41, it should be noted that if we had referred to the flow diagrams submitted by United in its most recent rate proceeding in Docket No. RP72-75, we would have been provided with data showing that much larger volumes of gas are to be transported on both a peak-day and annual basis into the Green System-East. To be specific, instead of a zero volume entering the Green System-East at point "J" on the peak day of March 3, 1971, the adjusted figure would be 86,766 Mcf, and instead of 72,990 Mcf entering the Green System-East at point "I" on the peak day of March 3, 1971, the adjusted figure would be 108,371 Mcf. Similarly, instead of an annual volume of 2,119,631 Mcf entering the Green System-East at point "J", the adjusted figure would be 1,371,196 Mcf, and instead of an annual volume of 3,286,407 Mcf entering the Green System-East at point "I", the adjusted figure would be 11,024,446 Mcf. Since the adjusted figures used in Docket No. RP72-75 are attempting to estimate volumes for the 1971-72 heating season, they indicate that the Green System-East is expected by United to become increasingly reliant upon deliveries from United's interstate facilities in order to meet the uncertificated market's gas requirements.

42. In determining the jurisdictional issue, however, we do not believe that the relative level of the volumes involved are controlling. Section 1(b) of the Act does not delimit the amount of gas to be transported or sold in interstate commerce necessary for the exercise of Commission jurisdiction.

43. The case of *Connecticut Light & Power Co.* v. *F. P. C.*, 324 U.S. 515, 535-36 (1945), arising under the Federal Power Act, is instructive in this regard. There the Supreme Court, addressing itself to a *de minimis* argument, stated:

> "Another contention made by the Company may be shortly disposed of. It is contended that the volume of energy passing over certain of these facilities is insignificant in proportion to the total. Only about one-fifth of one per cent of all the energy received and generated by the Company throughout the State of Connecticut was transmitted out of the state * * * Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. Congress annually receives a report of the Commission's work and appropriates the funds for its continuance. If it thinks the Commission is over-extending its attention to trivial situations it has ready means of control in its hands. The wisdom of its work is not our concern, but only its legal justification. We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not think it would be appropriate to supply such a jurisdictional limitation by construction.

44. Our decision herein is in accord with *Federal Power Commission* v. *Florida Power & Light Co.* (U.S. Supreme Court No. 70-38, decided January 12, 1972, ... U.S. ....., 40 LW 4141) wherein the Supreme Court held that an electric utility was subject to the jurisdiction of this Commission because energy transmitted by it was commingled with energy transmitted by a jurisdictional company. There the issue was whether any energy was transmitted in interstate commerce *at all*. As the Court stated the test is not how much, but whether; "* * * no matter how small the quantity, FPC jurisdiction will attach because it is settled that

Congress has not 'conditioned the jurisdiction of the commission upon any particular volume or proportion of interstate energy involved and we do not . . . supply such a jurisdictional limitation by construction'" (Slip Op., p. 9, n. 10). The dissent noted that the commingling is minuscule and incidental.

45. The Louisiana Public Service Commission and several other parties contend that the Green System-East should be exempted from Commission jurisdiction under Section 1(c) of the Act.[7] The argument is made that to the extent some volumes of interstate gas have been delivered into the Green System-East such gas has been received, transported, and consumed wholly within the State of Louisiana, and that since the rates, services and facilities of the Green System-East are regulated by the Louisiana Public Service Commission, the requirements for exemption under Section 1(c) have been met. United maintains that Section 1(c) is inapplicable since the Louisiana Public

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[7] Section 1(c) of the Act reads as follows:

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and services of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717(c)]

Service Commission may not regulate direct sales,[8] and that granting an exemption under Section 1(c) would leave a regulatory gap.

46. Staff opposes an exemption on additional grounds. It dismisses initially the assertion that Section 1(c) is self-executing and that no application therefor nor showing in support thereof need be made, citing the provision in the Section requiring an evidentiary showing with respect to State commission jurisdiction. Section 1(c) is applicable, argues Staff, only "* * * if all the natural gas so received is ultimately consumed within such State," and that is not the case with all the gas received by United from other persons in Louisiana, *e.g.*, deliveries from the Getty plant at Bastian Bay. It also contends that the "from another person" requirement of the Section is overlooked by those seeking an exemption.

47. The proponents of the Section 1(c) exemption agree that United's Green System-East receives gas from United's system, but seek succor by citing the case of *Mountain Gas Company*, Docket No. CP68-303, and *Cabot Corporation*, Docket No. CP68-176, 42 FPC 305, *aff'd sub nom. Public Service Commission of West Virginia v. F.P.C.*, 437 F.2d 1234 (4th Cir. 1971), for the proposition that the gas need not be received "from another person" as plainly set out in

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[8] Art. 6, Sec. 4 of the Louisiana Constitution, as amended in 1964, provides in pertinent part that: "* * * the [Public Service] Commission shall have no power or authority to supervise, govern, regulate, and control any aspect of sales of natural gas direct to industrial users for fuel or for utilization in any manufacturing process, whether such direct sales are made by natural gas producers, natural gas pipeline companies, natural gas distribution companies, or any other person engaging in such sale of natural gas."

[9] In that case part of the gas was received by Cabot from its own wells at some of the facilities proposed to be exempted. The bulk of the gas, however, was purchased from Tennessee Gas Pipeline Company.

Section 1(c). In our view *Mountain Gas* is inapposite since most of the gas there in question was purchased from another person.[9] Noting that Section 1(c) is applicable solely "to any person engaged in or legally authorized to engage in the transportation of gas in interstate commerce," Staff additionally asserts that the arguments of the parties favoring exemption are inconsistent with their contention that the Green System is an entirely separate intrastate entity. This apparent inconsistency has no bearing on our determination of this question, as we reject the tortured reasoning which would artificially maintain a division of the integrated facilities of United's system. We find that a Section 1(c) exemption does not obtain in the circumstances presented.

48. The Louisiana Commission does not regulate any aspect of direct sales and thus, in any event, an exemption would not be available, even to a separate pipeline company.[10] This Commission, on the other hand, has substantial regulatory authority over the service of gas to direct customers. Deliveries to direct customers cannot be made without a certificate from this Commission and the Commission must determine whether the public convenience and necessity is met in light of the proposed terms of those transactions.[11] In addition, the Commission, pursuant to Section 7(b), must determine whether service to a direct customer or any other customer should be abandoned be-

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[10] We take official notice of a letter to this Commission, dated June 16, 1971, in which the Chairman of the Louisiana Public Service Commission indicates that the Louisiana Commission does not exercise jurisdiction over direct sales to industrial customers. We note that 1(c) exemptions have been previously granted within Louisiana. See *Central Louisiana Electric Co., Inc.*, Docket No. CP62-129, 27 FPC 374 (1962); *United Gas Pipe Line Co.*, Docket No. CP68-203, and *Sugar Bowl Gas Corp.*, Docket No. CP68-204, 39 FPC 619 (1968). However, we note that in each case that there was no disclaimer of jurisdiction by the Louisiana Public Service Commission, as in this case.

[11] *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 232 F.2d 467, 471 (5th Cir. 1956).

cause of depleted gas supply or because it no longer meets the public convenience or necessity. The price at which the direct industrial sale is made is thus material in both certificate and abandonment proceedings. While the absence of State regulation is not material to a determination of our own jurisdiction, it nevertheless follows that the exercise of jurisdiction by this Commission over the Green System-East would provide regulation related to certain direct service where none is presently undertaken by the State and therefore contribute measurably to the regulatory process.

49. We recognize, however, that the State purports to regulate sales for resale in the New Orleans and Lafayette Districts. While our assertion of jurisdiction herein would substitute Federal regulation for State regulation over such sales, the substitution of Federal regulation occurs simply as a consequence of our determination that these sales are in interstate commerce and the fact that State regulation will be affected has no bearing on our determination. Moreover, the exercise of our jurisdiction over sales and services in interstate commerce does not impinge upon State regulation of sales and services by the distributors receiving gas from United.

50. In declining to grant United an exemption under Section 1(c) of the Act, we are aware that such an exemption was granted in *United Gas Pipe Line Co.*, Docket No. CP66-137, 35 FPC 172. However, that case involved a sale for resale over which the Louisiana Public Service Commission asserted jurisdiction; moreover, the gas was purchased from Transcontinental Gas Pipe Line Corporation, "another person" within the meaning of Section 1(c), and the facilities involved were not connected with United's interstate system. The present case is clearly distinguishable inasmuch as it involves direct sales, over which the Louisiana Public Service Commission has disclaimed jurisdiction, the gas is not purchased from "another person", and the

facilities involved are directly connected to United's interstate system.

51. It is argued that United deliberately introduced interstate gas into the New Orleans District to bring about the situation that exists in order to serve its own interests with respect to its direct-sale contracts and curtailment plans. The alternative that this argument suggests is that the Commission should order United to desist from making any further deliveries into the New Orleans District. With the exception of two producers, no party to this proceeding suggests this course of action. It appears from the record that were it not for deliveries of interstate gas in the past years, the system would have been unable to meet its peak-day requirements.[12] Moreover, as we have noted herein, the Green System-East will have a considerable deficiency in its peak-day gas requirements for the current winter heating season as well as for the next heating season. Thus, the jurisdictional facts of interstate transportation and sale of gas exist; the motives that brought them about are not material to our determination.[13]

52. We believe that no extended discussion of the applicable law is required in support of our jurisdiction under the circumstances presented. The Commission's opinion in *Lo-Vaca Gathering Co.*, 26 FPC 606 (1961), *aff'd sub nom. California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), followed by the Supreme Court's *Amerada* and the Fifth Circuit's *Florida Parishes* opinions *supra*, leaves no room for argument that the commingling of interstate gas with intrastate gas and the delivering of gas to intrastate markets from interstate pipelines are sufficient integration of interstate and intrastate operations to bring the uncertificated sales and facilities within the Commission's jurisdic-

[12] See Exhibit 22.

[13] *See Western Union Telegraph Co.* v. *Speight*, 254 U.S. 17 (1920); *Price* v. *Western Union Telegraph Co.*, 156 Fla. 406, 23 So.2d 491 (1945).

tion. As the court pointed out in the *Florida Parishes* case (359 F.2d 525 at 528):

> * * * The facts in each of those cases [*Lo-Vaca* and *Amerada*] more strongly supported the argument for state jurisdiction over the gas produced, gathered, transported and sold in the same state than do the facts of this proceeding. In each instance, however, the Supreme Court held that the mixing of intrastate gas with a substantial portion of interstate gas for pipeline transportation in one commingled stream gave the Commission jurisdiction "at the outset over the entire transaction."

53. We wish to make clear that the facilities, sales, and services in question became subject to our jurisdiction at such time as the commingling of interstate and intrastate gas took place. The Commission's jurisdiction under the Natural Gas Act does not depend upon whether a natural-gas company fulfills its obligation thereunder to obtain a certificate of public convenience and necessity. *J. M. Huber Corp.* v. *Federal Power Commission*, 236 F.2d 550 (3rd Cir. 1956), *cert. denied*, 352 U.S. 971 (1956). *International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1349 (2nd Cir. 1971), *cert. denied*, —— U.S. —— (Sup. Ct. No. 70-216, October 12, 1971).

54. Although there is sufficient evidence in the record to find jurisdiction, we believe that certain aspects of United's operation of its facilities in the area in question require amplification. In the remanded proceeding United should present an Exhibit K setting forth the lengths and diameters of pipelines and other facilities in the Lafayette and New Orleans Districts for which it seeks certification. The original cost of all facilities should be shown together with accrued depreciation thereon.

55. During the cross-examination it appeared that United has previously obtained certificates to make sales from

some of the uncertificated facilities. For example, although United seeks to have its Weeks Island pipeline certificated in this proceeding, the Commission issued on June 26, 1968, an order in *United Gas Pipe Line Co.*, 39 FPC 1029, certificating a sale to Humble Oil & Refining Company from that pipeline. Moreover, despite the fact that the order specifically restricts deliveries of gas to Humble to a maximum of 3,500 Mcf per day, Exhibit 17 indicates that United has delivered up to 7,010 Mcf per day to Humble at that point. Likewise, the Commission has apparently certificated some facilities near the lateral line serving Baton Rouge, but United's witness was not clear as to what those facilities were or whether they are still used for the purpose for which they were originally certificated.

56. United should also include in Exhibit K a separate breakdown of the facilities comprising the 24 interconnections at which interstate gas may be injected into the Lafayette and New Orleans facilities. Inasmuch as United claims that increasing quantities of interstate gas will be needed to supply the Southern Louisiana market, it should explain where the increased quantities of interstate gas will be obtained and which of the 24 interconnections will be used for that purpose.

CERTIFICATION ISSUES

(1) Introduction

57. As set forth in its opinion in *Kansas Pipe Line & Gas Co.*, 2 FPC 29 (1939), the Commission has considered five primary factors in determining whether a certificate of public convenience and necessity should be issued. Those five factors are whether a market for the gas has been shown, whether there is a gas supply available to serve the proposed markets for a time sufficiently long to justify the construction of the facilities, whether the facilities proposed

to be constructed are adequate from an engineering point of view, whether the proposed sales will return sufficient revenues to enable the applicant to recover the cost of service involved in rendering the proposed sales and services, and whether the applicant will be able to obtain the financing necessary to construct the proposed facilities. United's application in this proceeding is unusual in that the facilities for which it seeks a certificate have already been constructed, the markets have already been attached, the gas is already flowing, the facilities have already been financed, and proposed rate increases covering the sales involved are presently pending before the Commission.

58. Although the Lafayette and New Orleans District contain existing pipeline systems now in operation, those systems were constructed many years ago and have been operated as independent intrastate pipeline systems entirely separate from United's integrated interstate system over which the Commission exercises jurisdiction. Therefore, when United filed its application requesting that the Commission issue a certificate covering all the facilities, resales, and services being rendered in its Lafayette and New Orleans Districts, it was obligated to present evidence showing that the attachment of those facilities, resales, and services to the interstate pipeline system is required by the public convenience and necessity. While we recognize that with existing facilities certain conventional data may be omitted, we note certain deficiencies in the record as outlined below which should be the object of an additional evidentiary presentation.

(2) **Markets**

59. United's market evidence consisted of a tabulation of its resale and direct-sale customers showing the largest

[14] United is currently involved in a curtailment proceeding before the Commission in Docket Nos. RP71-29, *et al.*

volumes which they have taken on non-coincidental peak-days, but United failed to show what volumes it is obligated to deliver to its customers under the most recent service agreements and direct sale contracts. Since United is operating under the curtailment provisions of its tariff at the present time,[14] any certificate issued should contain volumetric limitations in accordance with the Commission's Statement of Policy in Order No. 431 issued April 15, 1971, in Docket No. R-418. Therefore, in the remanded proceeding United should present as part of its market evidence copies of the service agreements which it has most recently negotiated with its resale customers. If United's gas supply deficiency prevents it from proposing to deliver contractual volumes to its resale and direct-sale customers, it should make a separate tabulation of the actual volumes it expects to deliver in light of its current gas supply situation.

(3) **Gas Supply**

60. Since United is now curtailing deliveries to its customers, the Commission assumes that United has a deliverability of less than one year, but United did not present any evidence which would permit the Commission to evaluate the impact on the existing interstate customers that would result if the Commission were to certificate the service proposed to be continued in the Lafayette and New Orleans Districts. Therefore, United's gas supply evidence should show the volumes of gas which will be available to serve the existing interstate markets with and without the markets in the Lafayette and New Orleans Districts. Inasmuch as United claims that a much greater quantity of interstate gas will be needed to serve the Lafayette and New Orleans Districts within the next two or three years, its deliverability exhibit should project the impact on the existing interstate market if it were to be permitted to provide service from its interstate system to all of its customers in the Lafayette and New Orleans Districts.

61. United's shortage of gas raises the possibility that authorization of markets in the Lafayette and New Orleans Districts will result in the taking of disproportionate volumes of gas from existing industrial customers now being served with the gas supply previously committed to serving only interstate markets. Therefore, United's deliverability study should show to what extent the deficiencies in gas supply alleged for the Lafayette and New Orleans Districts are based upon the requirements of industrial customers as compared with the needs of residential and commercial customers.

62. A question in this proceeding is whether customers who were being served from what has previously been an entirely separate intrastate system with its own gas reserves should now be allowed to continue to purchase gas from a gas supply which presumably was not committed to serving an uncertificated system and its customers.

(4) **Engineering Feasibility**

63. United's evidence consisted of flow diagrams showing net movement of gas on only an annual basis. The Commission has compensated for United's failure to present peak-day flow diagrams by examining the diagrams for January 6, 1970, which were received in evidence as Item E and by taking official notice of the flow diagrams for the peak day of March 3, 1971. At the remanded hearing the peak-day flow diagrams for March 3, 1971, should also be received in evidence as an item by reference to the Commission's files.

64. The Commission normally evaluates engineering and economic feasibility on the basis of the third-year volumes of gas to be served in a proposed market. Since United has previously served the Lafayette and New Orleans Districts with gas from fields located fairly close to the markets, it is essential that United show how increasing quantities of

gas can be introduced into the Lafayette and New Orleans facilities so that the Commission will know whether additional facilities will have to be constructed to transport gas from interstate gas sources to markets in the Lafayette and New Orleans Districts.

(5) **Economic Feasibility.**

65. To the extent that United addressed itself to the question of economic feasibility, it shows that the certificate should be denied because it claims that the direct-sale customers which are presently attached to the Lafayette and New Orleans facilities are noncompensatory since the rates in some of their contracts with United are so low that they do not cover United's average cost of purchased gas.

66. The Commission has for many years conditioned certificates to require pipeline companies and industrial customers to modify their contracts to remove "escape" clauses therefrom.[15] There have been instances where the Commission conditioned a certificate authorizing the expansion of a pipeline company's existing system upon the procure-

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[15] In Houston Texas Gas & Oil Corp., 16 FPC 118 (1956), *aff'd sub nom. Florida Economic Advisory Council* v. *F. P. C.*, 251 F.2d 643 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 959 (1958), the Commission conditioned the certificate issued to require removal of clauses in contracts which would have permitted electric companies to pay transportation rates based on the competitive cost of oil. In *Northern Natural Gas Co.*, 22 FPC 164 (1959), *aff'd sub nom. Minneapolis Gas Co.* v. *F. P. C.*, 278 F.2d 870 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960), the Commission required a pipeline company to remove from its direct-sale contracts with electric companies clauses which would have permitted the electric companies to stop purchasing gas if the price of coal should become cheaper than the cost of gas.

[16] *Midwestern Gas Transmission Co.*, 22 FPC 775 (1959), *aff'd sub nom. Michigan Gas and Electric Co.* v. *F. P. C.*, 290 F.2d 374 (D.C. Cir. 1961), *cert denied*, 368 U.S. 897 (1961), *Northern Natural Gas Co.*, 30 FPC 859 (1963), and *Southern Natural Gas Co.*, 31 FPC 789 (1964).

ment of firm contracts with industrial customers to assure the economic feasibility of the proposed expansion.[16] In the remanded proceeding, if it is determined that the service United is rendering to industrial customers is non-compensatory, and if the certificate were otherwise required by the public convenience and necessity, the Commission could consider granting the certificate conditioned to assure that the allocable cost of service to the direct industrial customers is recovered.

67. Before the Commission can determine economic feasibility, however, United should present an economic feasibility study showing the cost of service allocable for the Lafayette and New Orleans Districts. Such a study should show the deficit, if any, which would result from serving both resale and direct-sale customers in the Lafayette and New Orleans Districts.

68. Gulf States Utilities Company presented Exhibit 24 which indicates that United's full cost of service in the entire New Orleans Division (which includes both the Lafayette and New Orleans Districts as well as United's *interstate* transmission lines) ranges from 3.4 to 4.5 cents per Mcf exclusive of the cost of purchased gas. However, Gulf States' exhibit needs to be refined so as to allocate only to the Lafayette and New Orleans Districts that portion of the cost of the interstate pipelines which should appropriately be assigned to those areas. Despite the unrefined nature of its evidence, Gulf States shows that the rate in its direct-sale contract with United fails to pay United's full cost of service associated with serving Gulf States' generating plants. The Commission must determine whether to certificate direct sales which do not pay their full share of the cost of service.

69. In presenting its economic feasibility evidence in the remanded proceeding, United may utilize the same rates

of return and depreciation which were employed in its last rate increase filings in Docket No. RP72-75. Use of such rates in a certificate case is illustrative of the highest costs the existing and proposed customers may have to pay and makes it possible to test the economic feasibility of proposed new service in light of rates being proposed for service to existing customers.

70. The foregoing discussion shows that the evidence in the record is insufficient to permit a determination of whether the certificate sought by United is required by the public convenience and necessity. We shall, therefore, remand the proceedings to the Presiding Examiner as hereinafter provided. Our determination that the Commission has jurisdiction over United's operations in the Victoria and New Orleans Divisions, however, requires that we address ourselves to the status of United's existing services in these Divisions pending the Commission's determination of the certificate issues.

71. In the absence of the issuance of a certificate at this time, we have two alternatives with regard to the existing service provided by United pending a Commission determination on remand: (1) the immediate termination by United of deliveries into the systems in question, or (2) the continuation of deliveries of interstate gas into these systems on an emergency basis pending final disposition of this matter.

72. Evidence of record shows that United's customers in this area have in the past received substantial quantities of interstate gas supplies during the 1970-71 heating season and, based on projections for the 1971-72 heating season and thereafter, will require more substantial quantities of interstate gas, approximately 67% of the peak-day requirements in the New Orleans District. Moreover, the record does not disclose the impact on United's customers in the

Victoria and New Orleans Divisions of an abrupt discontinuation of interstate deliveries into these systems.

73. In view of these facts, we believe that the public interest may best be served by continuation of United's service to prevent the undue hardship that might result from an immediate termination of interstate deliveries. We shall, therefore, authorize the continuation of such existing deliveries of interstate gas into the Victoria and New Orleans Divisions on an emergency basis, subject to the condition that these facilities be operated as part of United's integrated interstate system fully subject to our exclusive jurisdiction. Thus due to the current shortage of gas on United's system, deliveries to customers in these Divisions shall be subject to the curtailment provisions of United's tariff, pending the Commission's decision in the remanded proceedings, and all other matters, rate or otherwise, shall be subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder.

74. We are aware that the finding of jurisdiction over the New Orleans and Lafayette Districts raises the question of the regulatory impact on the producers who have made sales both before and after the unauthorized commingling of gas occurred on these systems. We do not consider this question herein. To assure equitable treatment we will permit those producers selling directly to facilities herein declared jurisdictional to file their contracts pursuant to Paragraph 12 of Docket No. R-389A for consideration by this Commission without prejudice to their right to challenge this opinion on appeal and without admitting that this Commission has jurisdiction over the sales in question.

75. In *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, Fifth Circuit No. 71-2550, decided Jan. 14, 1972, ... F.2d ....., the court held that "* * * The regulation of

the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction" (Slip Op., p. 29). Since we respectfully disagree with the legal conclusion drawn by the court, we are constrained to consider the question of whether this Commission is precluded from making an independent decision based upon the record in the case before us.

76. We have examined the basic authorities on *res judicata* and estoppel by judgment and fail to find any authority for the proposition that an administrative agency charged by Congress to determine its jurisdiction in accordance with the Administrative Procedure Act and the Natural Gas Act must terminate its proceedings when a court, in a collateral suit, reaches the jurisdictional question. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

77. We have considered such cases as *Commissioner* v. *Sunnen*, 233 U.S. 598 (1948), wherein the Supreme Court held the doctrine of estoppel inapplicable to subsequent relitigation by an agency of the same question decided adversely to it in court.

78. In *Otis & Co.* v. *S. E. C.*, 176 F.2d 34 (D.C. Cir. 1948); *rev'd per curiam*, 338 U.S. 843 (1949), SEC brought a suit in the District Court to require certain parties to testify in a concurrent administrative proceeding. Upon the court ruling against SEC, Otis then sought injunctive relief to terminate the administrative hearings. The District Court dismissed the suit and the Court of Appeals reversed. The Supreme Court upheld the District Court dismissal, citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), *supra*.

79. In *Federal Water and Gas Corp.*, 188 F.2d 100 (3rd Cir. 1951), the SEC approved a plan which was ultimately affirmed in the Supreme Court. On subsequent order, the

Court of Appeals attempted to modify the agency's order, but the Supreme Court prohibited this. This decision is not in point.

80. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), has no application to this situation since there was no question of forum or primary jurisdiction. The same is true of *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938).

81. In *U. S.* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966), the Advisory Board of Contract Appeals held hearings in which the company asserted claims against the Atomic Energy Commission for additional compensation and time extension. Subsequent to the decision, the respondent brought suit for breach of contract in the Court of Claims which ruled that the factual issues in the controversy should be resolved in a judicial trial. The Supreme Court held that the Court of Claims could review the administrative record, but could not retry the issues, which had properly been before the agency and which the parties had an adequate opportunity to litigate. This case is instructive, since it reflects the deference to administrative proceedings which we have asserted.

82. In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Federal Power Commission issued a license to construct and operate a hydroelectric project. The City petitioned the Court of Appeals on the ground that the City could not act in opposition to a State policy. The Court of Appeals affirmed the Commission's order and the Supreme Court denied certiorari. In regard to the bond issue, the State court enjoined the City and Supreme Court of Washington affirmed. The U.S. Supreme Court in granting certiorari stated that the bond validation suit was an impermissible collateral attack upon the final judgment of the Court of Appeals in the initial proceeding. There, again, the administrative proceedings were held to be primary.

83. We conclude that we are not precluded from reaching a decision by the action of the court's opinion. The *LP&L* case is a collateral attack on the Commission's jurisdiction to hear and to decide the case presented in Docket No. CP71-89. Counsel for the Commission, authorized and directed to appear for the Commission as intervener in the collateral suit, asserted the primary jurisdiction of this Commission to decide the case; — the Commission did not — and could not — take a position on the merits until this decision was reached. Therefore, the instant decision is the first opportunity we have had to decide the issues entrusted to us by the Congress through the Natural Gas Act, subject to court review. We thus feel constrained to state for the review of any Court of Appeals and the Supreme Court, if certiorari be granted, the findings and conclusions of law in the order herein entered.

The Commission finds:

(1) Applicant, United Gas Pipe Line Company, a Delaware corporation having its principal place of business in Shreveport, Louisiana, is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission in its order of January 20, 1942, in Docket No. G-216, 3 FPC 3.

(2) United has introduced significant quantities of interstate gas into its Lafayette and New Orleans facilities and has commingled uncertificated and interstate gas supplies since 1965.

(3) The Federal Power Commission has jurisdiction under the Natural Gas Act and particularly Sections 2(7) and 1(b) thereof over the facilities, transportation, and sales for resale of natural gas by United by means of and from its interstate facilities within United's Victoria and New Orleans Divisions in the States of Texas and Louisiana, respectively.

(4) United has failed to present sufficient evidence as required by the Commission's Regulations to permit the Commission to evaluate the factors entering into determining whether the certificate of public convenience and necessity requested by United should be issued or granted with conditions.

(5) The proceeding should be remanded to the Presiding Examiner in order to permit United to satisfy the evidentiary deficiencies which have hereinbefore been specified.

(6) United's sales and services within the Victoria and New Orleans Divisions should be continued on an emergency basis pending farther order of the Commission in the remanded proceedings.

The Commission orders:

(A) The proceeding in Docket No. CP71-89 is hereby remanded to the Presiding Examiner for receipt of additional evidence to overcome the deficiencies hereinbefore specified.

(B) Within 45 days after issuance of this order United shall file with the Commission and serve upon the Presiding Examiner, all parties to the proceeding, and the Commission's staff the testimony and exhibits required to satisfy the evidentiary deficiencies hereinbefore specified.

(C) Within 30 days after the filing and service of United's evidence all other parties and the Commission's staff shall file with the Commission and serve upon the Presiding Examiner, United, and other participants any evidence which they may wish to present in support of their positions.

(D) Service to all customers in the Victoria and New Orleans Divisions shall be continued on an emergency basis, on condition that United's facilities therein be oper-

ated as part of its integrated interstate system, subject to curtailment under United's tariff and subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder, pending the issuance of a final decision in this proceeding.

(E) The hearing in the remanded proceeding shall commence on April 25, 1972, at 10:00 a.m. (EST) in one of the Commission's hearing rooms, 441 G Street, N.W., Washington, D.C. 20426.

(F) The motions for oral argument made herein are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended hereto.

[SEAL]

Kenneth F. Plumb,
Secretary

UNITED GAS PIPE LINE COMPANY) DOCKET No. CP71-89

(Issued February 9, 1972)

CARVER, Commissioner, *dissenting:*

I dissent from so much of this opinion as relates to the New Orleans District (or Green System-East) portion of United's facilities in the State of Louisiana.

To understate the matter considerably, this is a most unusual case. The applicant is a major pipeline company, long recognized as a "natural gas company" for the purposes of regulation under the Natural Gas Act, and a party to numerous, probably hundreds, of proceedings before this Commission. For more than a decade, however, it has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit free of Federal regulatory impact and free to contract in any manner it chose, consistent with State law.

Suddenly, in late 1970, United finds virtue in the privilege of being regulated and seeks to invoke our jurisdiction through this application. Why? United says *Florida Parishes* require such action. I disagree, but even if that were the case, Florida Parishes was finally concluded in 1966 and four years is a long time for error to surface in this fashion. Another explanation, less admirable but more plausible, lies in a combination of factual coincidences. United's Green System-East serves a heavy industrial load under long-term contracts reflecting the favorable rates

that prevailed when gas supplies were plentiful and pipeline capacity needed markets.[1] But between 1962 and 1970, the ratio of reserves to production for the supplies the Green System could rely upon dropped from an ample 30:1 to a dangerously low 4.6:1. Stated otherwise, at 1970 levels of delivery, United's available reserves could meet its customers' needs for less than five years. Hardly surprising, then, is the fact that within the same month that this application was filed, United also sought (and ultimately received) the assurance of this Commission that implementation of an approved curtailment plan "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts." *United Gas Pipe Line Company*, ... FPC ..... (Opinion No. 606, October 5, 1971).

I did not participate in the above proceeding, but dissented to its reaffirmation on rehearing (Opinion No. 606-A, December 3, 1971), both generally and with specific reference to the above-quoted holding.[2] My reservations were well-founded, as evidenced by the present effort to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands. The majority opinion concedes as much (see par. 51, *supra*).

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[1] Based on data in United's 1970 Annual Report and Exhibit 34 of the record, direct industrial sales represent nearly 68% of the volumes delivered by the New Orleans District (138.4 out of 203.7 million Mcf).

[2] The powers of this Commission are parallel in all essential respects to those conferred upon the FCC by the Communications Act of 1934 (47 U.S.C. 301ff), as to which the Supreme Court has said: ". . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." *Regents of the University System of Georgia v. Carroll, et al.* (1950) 338 U.S. 586, 600-602.

The preceding observations are merely descriptive of the general setting and the dominant motivations that surround the proceeding. It is necessary to state them here because they are not otherwise exposed to public view. They explain in considerable part my refusal to join in what the Commission does today, but they are buttressed by a broad array of more specific objections I have to the majority opinion. Ordinarily, I should feel compelled to document those legal, policy, and procedural differences in the detail they merit. I refrain from doing so, however, because the issues involved have passed from this arena. What is done here is a useless thing and one that portends difficulty for this Commission in the future.

While this proceeding was pending, some of the parties engaged in a race to the courthouse with this Commission in hot pursuit. *Louisiana Power and Light* v. *United Gas Pipe Line Company*, cited par. 75, majority opinion *supra*, constitutes a full adjudication by a court of competent jurisdiction of the very issues here considered. Until that judgment is vacated through available appellate resort, this Commission is without authority to issue any valid directive inconsistent therewith.

Whether we denominate the principle involved as *res judicata*, estoppel by judgment, or some other term, every lesson of the law tells us that we are bound by the opinion of the Fifth Circuit Court of Appeals unless and until its judgment is vacated through proper judicial process. The conditions for application of that principle could not be more clearly present: The issues are identical; the essential parties are the same. This proceeding merely renews a duel that has already been "fought out . . . in litigation with the other party." *Commissioner* v. *Sunnen*, 333 U.S. 598 (1948). (This case is not the same as *FPC* v. *Amerada Petroleum Corp., et al.*, 379 U.S. 687 (1965), because it

was there admitted by the court below that a new claim was being litigated in the second action. By contrast, the order being issued here is in head-on collision with the Fifth Circuit's holding on the status of United's Green System-East.)

This conclusion is the more compelling because of the special facts surrounding the earlier judicial proceeding. As the majority account amply discloses, this Commission was not an original party thereto, but chose voluntarily to intervene for the purpose of arguing its primary jurisdiction.[3] Knowingly and purposefully, it submitted to the jurisdiction of the courts which have so far considered the matter. "An administrative body which submits a legal question to a court of competent jurisdiction is bound by its judgment," *Otis & Co.* v. *SEC*, 176 F.2d 34 (CADC, 1948) (holding as summarized in Headnote 4), and may be enjoined from undertaking a subsequent proceeding to relitigate the same controversy. An attack on a prior judgment will also be rejected, "even though it was based on a patently erroneous view of the law." *In re Federal Water and Gas Corp.*, 188 F.2d 100, 105 (CA3, 1951), cert. den. *sub. nom. Chenery Corp. et al.* v. *SEC*, 341 U.S. 953 (1951).

Res judicata concepts are controlling as to jurisdictional questions as well as factual matters bearing on the merits, *Stoll* v. *Gottlieb*, 305 U.S. 165, 172 (1938), and enforces

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[3] In this respect, the majority opinion fails to make the proper distinction between the parallel and equal doctrines of primary jurisdiction on the one hand and *res judicata* on the other (par. 83). Primary jurisdiction does not constitute an *ouster of power* to hear a case; it merely provides a working formula to establish *priority of consideration* where substantive issues in the proceeding are within the expert competence of the agency. *Res judicata* is an effective bar to rehearing of an issue already litigated. As presented here, the ultimate distinction is between an alleged *collateral* attack upon administrative jurisdiction and a *direct* attack upon a judgment already rendered.

repose "not only as respects matters actually presented . . . in the original proceeding, but also as respects any other available matters which might have been presented to that end" (Citations omitted), *Chicot County Drainage District* v. *Baxter State Bank, et al.*, 308 U.S. 371, 378 (1940).

Administrative proceedings are subject to the same principles as judicial bodies in this respect, and there is no doubt but what the courts would have protected our process had the issues herein been decided initially by this Commission and allowed to become final, *U.S.* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966); nor will the state courts be permitted to retry issues previously determined by the Commission acting within its proper scope of authority. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 339 (1958).

This is a sword that must be allowed to cut both ways if administrative and judicial authority are to respond in the complementary and concurrent manner that our complex society requires. By our intervention in a private lawsuit, we have already lent the weight of sovereign Federal authority to one side of the balance. Having failed to carry that forum, it is proposed to flout the court's mandate, an action which is as fruitless as it is irresponsible.

/s/ JOHN A. CARVER, JR.,
John A. Carver, Jr.,
Commissioner

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NO. 71-1016

IN THE

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OCTOBER TERM, 1971

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*
(The Collateral Proceeding)

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*
(The Curtailment Proceeding)

MEMORANDUM OF THE PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK IN SUPPORT OF MOTION FOR EXPEDITED CONSIDERATION AND PETITIONS FOR WRITS OF CERTIORARI

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MEMORANDUM OF THE PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK IN SUPPORT OF MOTION FOR EXPEDITED CONSIDERATION AND PETITIONS FOR WRITS OF CERTIORARI

The Public Service Commission for the State of New York (New York), an intervenor before both the Federal Power Commission and in the Fifth Circuit Court of Appeals in the so-called "curtailment proceeding,"[1] strongly supports the Motion for Expedited Consideration and Petitions for

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[1] The lead case in the Fifth Circuit seeking review of the Federal Power Commission's opinions in the curtailment proceeding is *Louisiana Power & Light Co., and New Orleans Public Service, Inc. v. Fed-*

Writs of Certiorari which have been filed in these proceedings by the Solicitor General on behalf of the Federal Power Commission. In New York's view only prompt action by this honorable Court can permit the Federal Power Commission to proceed with urgently needed action on a number of curtailment proceedings now pending before the Commission.

NEW YORK'S INTEREST

The Public Service Commission for the State of New York is a regulatory body established under the laws of that state to insure, *inter alia,* that New York citizens receive adequate supplies of natural gas at the lowest prices consistent with the healthy growth of the gas distribution industry. See *McKinney's Consolidated Laws of New York,* Vol. 47. Virtually all of the natural gas consumed in New York State originates in other states, in large part from Southern Louisiana and the Texas Gulf Coast, and from the continental shelf offshore the states of Louisiana and Texas in the Gulf of Mexico. From these and other areas it is then transported into New York by a number of interstate pipelines which are subject to the rate and service jurisdiction of the Federal Power Commission, some of whom in turn purchase major portions of their gas from other pipelines. As a result of this situation the Public Service Commission has found it necessary, in order to protect the interests of gas consumers in its state, to intervene and participate actively in proceedings before the Federal Power Commission relating to the pipelines serving New York and their suppliers. See, *e.g., Atlantic Refining Co. v. Public Service Commission for the State of New York (CATCO* case*),* 360 U.S. 378 (1959).

Of the six interstate pipelines presently providing gas to New York distribution companies, five, Transcontinental Gas Pipeline Corporation, Texas Eastern Transmission Com-

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eral Power Commission, Case No. 71-3429. New York's petition to intervene in that case was granted by order of Judge Coleman on January 11, 1972.

pany, Algonquin Gas Transmission Company, Consolidated Gas Supply Corporation, and Columbia Gas Transmission Company, presently have curtailment proceedings pending before the Federal Power Commission and two of these, both of which account for major amounts of gas consumed in New York, have actually found it necessary to curtail firm service to the customers in New York and other states for extended periods during the present winter heating season. In addition, curtailment proceedings are pending involving a number of other pipelines who sell large amounts of gas to the pipelines serving New York. Predominant among these other pipelines is the United Gas Pipe Line Company, the pipeline involved in the present cases, which is a major supplier of gas to Texas Eastern and Texas Gas Transmission Corporation, and through them to Consolidated Gas Supply, and Algonquin Gas Transmission. It is New York's understanding that the firm service curtailment which Texas Eastern has had to impose during the present winter heating season is the direct outgrowth of the curtailment in turn imposed on it by United Gas Pipe Line. It was for this reason, among others, that New York intervened and participated in the United curtailment proceeding before the Commission, and has intervened in the several petitions for review of the Commission's Opinion No. 606 therein which have been filed in the Fifth Circuit.[2]

ARGUMENT

It is of the utmost importance to gas consumers in the State of New York for this Court, at the earliest possible time, to pass upon the validity of the decision of the court

[2] While most of the pipelines serving New York make some direct sales (though none within New York), this is a relatively unimportant aspect of their business. However, major pipeline suppliers of the pipelines serving New York, including preeminently United, make extensive direct sales. The issue posed by the present petitions thus has an important bearing on the total amount of natural gas available to New York consumers.

below holding that the Commission lacks any authority to consider the direct sales of the interstate pipelines in passing upon the curtailment plans instituted by the pipelines in periods of gas supply shortage. As the Solicitor General's petitions point out, the opinion below is in direct conflict with prior statements of this Court stating that curtailment of service to direct customers is primarily related to transportation of natural gas "and thus within the jurisdiction of the Commission to control" *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 322 U.S. 507, 523; see *Federal Power Commission v. Transcontinental Gas Corp.*, 365 U.S. 1, 28 (1961).

Relying on such opinions and its extensive powers over the interstate transportation of gas under Sections 4, 5 and 16 of the Natural Gas Act (15 U.S.C. §§ 717(c), 717(d), and 717(o)), the Commission over the years has handled pipeline curtailment proceedings, including questions as to the amount of gas to be made available to direct customers, under these sections. See, *e.g.*, *City of Detroit, Michigan, et al. v. Panhandle Eastern Pipe Line Co., et al.*, 6 F.P.C. 196 1947).[3] The result of the lower court's decision is thus to carve out from the Federal Power Commission's effective control in curtailment situations a major portion of the gas flowing in interstate commerce.

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[3]The suggestion of the court below that the pipeline could voluntarily vest the Commission with jurisdiction over direct sales by filing for complete or partial abandonment of its transportation service for the direct sale under Section 7(b) of the Act, is by no means a practical solution to the problem. For this leaves vindication of the public interest in avoiding discrimination to the pipeline which may be the cause of the discrimination. Nor, even assuming they had authority to do so, is this a situation in which the states where the direct sales are made would have any interest in limiting the amount of gas available for such customers in order to more fairly ration the available gas among all of the pipeline's customers in the other states. See *Federal Power Commission v. Transcontinental Gas Pipe Line Co.*, 365 U.S. 1, 28 (1961); *California v. LoVaca Gathering Co.*, 379 U.S. 366, 370 (1965).

We also concur with the views of the Solicitor General that this Court should review that part of the decision of the court below holding that the Commission has no certificate jurisdiction over certain sales United is making in Louisiana to both direct and wholesale customers under circumstances where the gas flowing in the particular lines had originally all come from intrastate sources and the amount of out-of-state gas now flowing in these lines was, in the lower court's opinion, *de minimus*. *But, cf. Federal Power Commission v. Florida Power & Light Co.*, (United States Supreme Court No. 70-38, decided January 12, 1972). In this respect we point out that the jurisdictional issue involved in this part of the case, which as the Solicitor General indicated in his brief was pending before the Federal Power Commission at the time of the lower court's opinion[4] is directly related to the basic curtailment issue. For under a number of the sales contracts involved, United has agreed to *increase* sales to such parties at the same time as it was substantially curtailing service to its other interstate customers.

Finally, we cannot urge too strongly that this Court take action to insure that the matter will be brought before it for decision during this term of court. As indicated above, consumers of gas in New York are already being curtailed and the extent of this curtailment can increase dramatically if all direct customers of the pipelines directly or indirectly serving New York are immune from Commission control over pipeline curtailment plans. Moreover, a critical period of pipeline curtailment of gas is likely to occur during the heating season commencing in November of 1972. It is imperative therefore that the basic determination as to whether the Commission's authority over pipeline curtailment practices extends to direct sales be made in time for the

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[4]Since the filing of the Motion and Writs of Certiorari, the Commission on February 9, 1972 issued Opinion 610 in *United Gas Pipe Co.*, Docket No. CP71-89, holding that it did have jurisdiction over the sales in question.

Commission to act this spring in order to provide adequate relief for the next winter heating season. This can only be accomplished if the Court is prepared to act before the end of its current term.

Respectfully submitted,

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RESPONSE OPPOSING MOTION FOR EXPEDITED CONSIDERATION

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February 17, 1972

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RESPONSE OPPOSING MOTION FOR EXPEDITED CONSIDERATION

Shell Oil Company, an intervenor before both the Federal Power Commission and in the Fifth Circuit Court of Appeals in the so-called "curtailment proceeding,"[1]

1. The lead case in the Fifth Circuit seeking review of the Federal Power Commission's opinions in the curtailment proceeding is *Louisiana Power & Light Co., and New Orleans Public Service, Inc. v. Federal Power Commission,* Case No. 71-3429.

pursuant to Rule 35 of the Rules of The Supreme Court, opposes the Motion For Expedited Consideration filed herein by the Solicitor General on behalf of the Federal Power Commission. The motion asked that responses to the petitions for certiorari (which were attached to the motion) be required to be filed by February 28, 1972. The motion and petitions for certiorari were filed February 7, 1972 and were served on Shell by mail on February 10, 1972.

Rule 24 of Rules of the Supreme Court provide for 30 days after receipt of a petition to file an opposing brief. Under this rule, Shell would have until March 11, 1972 to file its opposing brief. The full time is needed in view of the complex nature of the decision for which review is sought, particularly if the review is to include the primary jurisdiction question[2] as presented in the Solicitor General's petition as well as the issue of the Commission's curtailment jurisdiction.

On February 15, 1972, Shell was served a copy of the Petition of United And Pennzoil For Writs of Certiorari To The United States Court Of Appeals For The Fifth Circuit, which seeks review of the same decision as is sought by the Solicitor General on behalf of the Federal Power Commission. On February 9, 1972, after the filing of the Solicitor General's motion and petitions, but prior to the filing of the United-Pennzoil petition, the Federal Power Commission issued its Opinion No. 610 in Docket No. CP71-89, *United Gas Pipe Line Company* (Appendix F to the United-Pennzoil petition). This opinion finds, *inter alia,* that the Federal Power Commission has juris-

2. The primary jurisdiction question is the second question presented in the Solicitor General's petition, relating to certificate jurisdiction over United's intrastate facilities.

diction over United's "Green System-East", which finding is in direct conflict with a finding of the Fifth Circuit in the decision for which review has been sought herein. Opinion No. 610 is the finding of primary jurisdiction which the Solicitor General contends should have preceded the Fifth Circuit decision.

Section 19(a) of the Natural Gas Act (52 Stat. 831; 15 U.S.C. § 717r) states in pertinent part as follows:

> "SEC. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied."

Shell is a "person aggrieved" by Commission Opinion No. 610 within the meaning of the Natural Gas Act. Shell is both a seller to, and a purchaser from, United's "Green System-East". We are now preparing an application to the Federal Power Commission for rehearing on its Opinion No. 610 to be filed before March 10, 1972. Action by the Commission thereon will have a material bearing on the primary jurisdiction issue urged to this Court for review. The certificate case (Docket No. CP71-89) was commenced on October 1, 1970 and the record was closed on July 2, 1971. The Commission's Opinion No. 610 in the certificate case was not issued until Feb-

ruary 9, 1972. The Solicitor's motion for expedition now seeks to require response to the petitions for certiorari even before applications for rehearing are filed in the certificate case. Assuming the earliest possible action by the Commission, the need for supplemental briefs to this Court concerning such action would appear a certainty if the expedited schedule requested by the Solicitor General is imposed.

The proceedings in United's curtailment case were commenced on October 26, 1970 with a petition filed in Federal Power Commission Docket No. RP71-29. Commission Opinion No. 606 was issued therein on October 5, 1971, with rehearing being denied in Opinion No. 606-A on December 3, 1971. It is now pending on review before the Fifth Circuit. The ordering paragraphs of Opinion No. 606 have never been stayed. In the action of the Fifth Circuit sought to be reviewed herein, the order dismissing the LP&L cause for injunctive relief was reversed and remanded to the District Court for further fact development on the issue of irreparable injury. Opinion No. 606 is now in effect. Even assuming arguendo that expedition is needed to protect the effectiveness of Opinion No. 606, that need for expedition does not apply to the primary jurisdiction issue.

The Solicitor General refers to nation-wide considerations as supporting the urgency for early resolution of the Commission's jurisdiction to curtail industrial sales. While we recognize these considerations as presenting very real concerns, they would at most justify expedition of the curtailment issues and not those related to United's certificate case (CP71-89). The jurisdiction of the Federal Power Commission, asserted in its Opinion No. 610, to certificate United's "Green System-East", (United's intra-

state facilities in the New Orleans area) and the decision of the Fifth Circuit that the Commission lacks such jurisdiction, do not present issues of such urgent national concern that they should be part of an expedited review requested even before applications for rehearing of Opinion No. 610 have been filed with the Commission. The Solicitor General's argument for expedition (pp. 22 and 23) refers only to the urgency for early determination of the Commission's curtailment jurisdiction over industrial sales. No reason whatsoever is advanced for expedition of the primary jurisdiction issue relating to United's intrastate facilities.

We respectfully oppose the Solicitor General's motion for expedition as being unnecessary and contrary to sound judicial administration, particularly with regard to the primary jurisdiction issue.

Respectfully submitted,

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February 17, 1972

Nos. 71-1016 and 71-1040

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UNITED GAS PIPE LINE CO.,
Petitioners,

v.

LOUISIANA POWER & LIGHT CO., *et al.*,
(FPC Opinion 606)
Respondents.

RESPONSE OF THE BROOKLYN UNION GAS COMPANY IN SUPPORT OF MOTION FOR EXPEDITED CONSIDERATION AND PETITIONS FOR WRITS OF CERTIORARI

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(FPC Opinion 606)

Respondents.

RESPONSE OF THE BROOKLYN UNION GAS COMPANY IN SUPPORT OF MOTION FOR EXPEDITED CONSIDERATION AND PETITIONS FOR WRITS OF CERTIORARI

The Brooklyn Union Gas Company (Brooklyn Union) supports the Motion for Expedited Consideration and the Petitions for Writs of Certiorari which have been filed in the captioned cases.

Interest of Brooklyn Union

Brooklyn Union is a gas utility company engaged solely in the distribution of gas at retail, primarily to domestic customers, hospitals, schools, and small businesses in a service area encompassing approximately one-half of the City of New York. Some 4,000,000 persons are dependent upon this Company for gas for heating, cooking and other essential uses.

Brooklyn Union obtains its entire gas supply from three interstate pipeline companies whose facilities originate in the State of Louisiana or other southwestern areas. A substantial portion of this supply is purchased by Brooklyn Union from Texas Eastern Transmission Corporation (Texas Eastern). Texas Eastern, in turn, obtains a substantial portion of its gas supply directly or indirectly from United Gas Pipe Line Company (United), the pipeline whose curtailment practices are in issue in the proceedings of which review is here sought.

Because of curtailments by United to Texas Eastern, Texas Eastern for some time has been curtailing gas deliveries to Brooklyn Union below contracted-for delivery volumes. As a direct result of the Texas Eastern curtailments (and curtailments by another Brooklyn Union pipeline supplier) this Company has been compelled to limit

the availability of gas service in its franchise territory in New York City. *New York Gas Supply Case,* 11 NY PSC —— (Order issued October 26, 1971). In addition, Brooklyn Union's ability to assure continued rendition of safe and adequate service to existing ultimate consumers of gas has been jeopardized. Unless the FPC's regulatory jurisdiction over *all* curtailment practices of interstate pipelines is promptly affirmed (in the Curtailment Proceeding) and the Fifth Circuit's denial of that jurisdiction with respect to direct sales is promptly reversed (in the Collateral Proceeding), the integrity of gas service to Brooklyn Union's customers will be further and seriously imperilled.

In order to protect its interests and the interests of its customers in an equitable allocation of scarce natural gas resources, Brooklyn Union intervened and was an active participant in the Curtailment Proceeding before the FPC and has intervened in support of the Commission decision (Opinion 606) in the pending Fifth Circuit cases in which review of that decision is sought.[1]

Argument

Brooklyn Union concurs in the arguments in support of the Motion for Expedited Consideration and the Petitions for Writs of Certiorari therein and in the Memorandum in Support of the Motion and Petitions submitted by the Public Service Commission for the State of New York. These persuasively detail many of the vital public interest

1. Brooklyn Union's intervention in the FPC proceeding was granted by Commission order issued March 10, 1971. Brooklyn Union's intervention in each of the cases in which review of FPC Opinion 606 is sought in the Fifth Circuit was granted on February 16, 1972.

considerations requiring immediate review of the FPC's Opinion Numbers 606 and 606A and the decision of the Fifth Circuit in the Collateral Proceeding.

The decision of the Fifth Circuit in the collateral proceeding represents a practical reversal of the FPC's determinations of jurisdiction in Opinions 606 and 606A, and is in direct conflict with prior decisions of this Court and other federal courts on the same or similar issues. *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1 (1960); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947); *Atlanta Gas Light Co.* v. *Southern Natural Gas Co.*, Civ. No. 16060 (D. Ga., Order dated February 11, 1972); *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, Civ. No. 2253-71 (D.D.C., January 21, 1972).

The Fifth Circuit's decision would relegate to local courts or agencies disputes concerning the allocation of scarce natural gas supplies between consumers in numerous states. That decision was made without any meaningful analysis of the ability of such local authorities to protect the interests of all the consumers affected, although such analysis has been stated by this Court to be a *sine qua non* to any judicial determination of the FPC's authority over direct sales. 365 U.S. 1, 22-23; See also, La. Const., Art. 6, §4. In this respect, the Fifth Circuit completely ignored the broad remedial purposes of the Natural Gas Act (See 365 U.S. 1, 19-20) and its decision has raised issues of vital importance in the administration of this statute requiring review by this Court. *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, reh. den. U.S. 870

(1963); *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, amdt. den. 361 U.S. 801 (1959); *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, reh. den. 358 U.S. 942 (1958).

If the Fifth Circuit decision is allowed to stand, its application to other direct industrial sales by United and other interstate pipelines lacking adequate supplies to meet in full all contractual commitments will have an immediate, widespread, and disastrous effect on service to the ultimate gas consumer. Appendix I to the Petitions of the FPC indicates the extent, but not the gravity, of the problem.

Like many other gas distributors, Brooklyn Union is now experiencing continuing substantial reductions in its available gas supply, as a result of curtailment of deliveries to the interstate market by United and other interstate pipelines. Appendix H to the Petitions of the FPC. The present level of these curtailments has raised a real danger of shut-down of entire sections of Brooklyn Union's distribution system. Such shut-downs, if they become necessary, will deprive numerous domestic, commercial, and industrial customers of gas service for heating, cooking, and other uses (R. 5667-68),[2] will create a risk of injury to life and property and will entail enormous costs for restoration of service. While the impact of pipeline curtailments may vary somewhat from company to company, the record in the Curtailment Proceeding makes it clear that adequate gas service to ultimate consumers in many states is similarly threatened. The Fifth Circuit's determination in the Collateral Proceeding, which effectively exempts direct in-

2. This reference is to the record in the Curtailment Proceeding, as certified to the Fifth Circuit.

dustrial customers of regulated pipelines from uniform curtailment procedures approved by the FPC, necessarily increases the threat of widespread service disruptions, since curtailing pipelines cannot make full deliveries to their direct industrial customers without further reducing deliveries to their resale customers who serve the needs of domestic and other ultimate gas consumers in many states.

The threat to the integrity of gas service to ultimate consumers engendered by the Fifth Circuit's decision in the Collateral Proceeding illustrates the need for prompt settlement by this Court of the interrelated questions presented by the petitions in these cases. Moreover, resolution of crucial issues relating to the scope of the FPC's jurisdiction under the Natural Gas Act to effectively safeguard the interests of ultimate gas consumers should not be undertaken without the benefit of the full administrative record in the Curtailment Proceeding. That record is indispensable for consideration of the question of adequacy of regulatory protection of the public interest essential to the determination of the FPC's jurisdiction in these cases.

The procedural status and importance of these cases make it clear that only this Court can finally and adequately resolve the questions presented, which are critical to the basic welfare and interests of all gas consumers. Delaying consideration of these questions to await decision by the Fifth Circuit in the Curtailment Proceeding would amount to an empty formality in light of that court's decision in the Collateral Proceeding. In view of the public interest in an expedited disposition of these cases, this Court should dispense with that formality. See *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

Conclusion

For the foregoing reasons, Brooklyn Union strongly supports the Motion for Expedited Consideration and the Petitions for Writs of Certiorari, and urges that they be promptly granted.

Respectfully submitted,

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FEDERAL POWER COMMISSION, *Petitioner,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Respondents

No. 71-1040

UNITED GAS PIPE LINE CO., ET AL., *Petitioners,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Respondents

REPLY IN PARTIAL OPPOSITION TO MOTION FOR EXPEDITED CONSIDERATION AND PETITIONS FOR WRITS OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Respondents

No. 71-1040

UNITED GAS PIPE LINE CO., ET AL., *Petitioners,*

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Respondents

RELY IN PARTIAL OPPOSITION TO MOTION FOR EXPEDITED CONSIDERATION AND PETITIONS FOR WRITS OF CERTIORARI

This reply is limited to the first question raised by the Federal Power Commission's Petitions for Writs of Certiorari which is stated in terms of the Commission's authority to approve a plan of curtailment of interstate gas service to direct customers under the Natural Gas Act.[1] Monsanto Company's rights are directly

[1] The question posed by the Commission reads as follows: "Whether the Federal Power Commission has jurisdiction under the Natural Gas Act, 15 U.S.C. 717, *et seq.*, to accept, approve, or modify a plan for the curtailing of natural gas deliveries by interstate pipelines to direct corporate users in order to effect a fair allocation of natural gas supplies among all ultimate gas consumers, including domestic users, in times of gas shortage." (Petitions for Writs of Certiorari, pp. 4-5.)

and adversely affected by the Commission's mode of stating the issue in light of its attempt to obtain a review of FPC Opinion 606,[2] and by its reference to Monsanto's pending suits in lower Courts against the Commission and United.

These Petitions for Writs of Certiorari arise from an extraordinary set of circumstances. They involve a most unusual breakdown in Federal Power Commission supervision of United Gas Pipe Line Company (United), a regulated natural gas pipeline company. This regulatory vacuum was exploited by a breach of the company's responsibilities as trustee of its gas supplies for the benefit of the firm customers which relied upon it for all of their gas supplies. The result was and is a breach by United of its gas supply contracts with a large number of its customers.

The question posed by the Commission incorrectly assumes that United's situation is typical. If answered by this Court without a realization of the real facts, United would escape accountability for its derelictions. To avoid this unjust result, the question of Commission jurisdiction over the curtailment of gas service to direct customers by United should be restated as follows:

1. Whether, in an industry in which forward supply-demand planning is the universal practice, a regulated natural gas pipeline company can lawfully curtail firm service to direct customers being provided under Federal Power Commission authorization, for reasons of gas sup-

[2] Issued October 5, 1971 in *United Gas Pipe Line Co.*, Docket Nos. RP 71-29, *et al.* Monsanto participated actively in the FPC proceedings leading to Opinion No. 606 and has petitioned to intervene in the appeals from that Opinion pending in the United States Court of Appeals for the Fifth Circuit.

ply deficiencies, without complying first with the abandonment provisions of Section 7(b) of the Natural Gas Act,[3] 15 U.S.C. 717f(b)?

STATEMENT

Monsanto is a direct firm customer of United. United has been authorized by the Federal Power Commission to transport up to 75,000 Mcf per day on a firm basis to Monsanto's Pensacola, Florida Plant upon a finding that it "is necessary and appropriate in carrying out the provisions of the Natural Gas Act" and required "by the public convenience and necessity".[4] Monsanto's Plant is the largest integrated nylon yarn manufactory in the world and the second largest non-governmental employer in the State of Florida.

United has severely reduced service to Monsanto below its firm contract entitlement of 65,000 Mcf per day during the past fifteen months without Monsanto's consent, effecting thereby an abandonment of service, without first obtaining the requisite permission of the Commission under the Natural Gas Act. Monsanto has sought to make United accountable for its actions in proceedings before the Commission,[5] through appeal from orders of the Commission,[6] and by a suit in District Court.[7]

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[3] The text of section 7(b) is set out in Appendix C hereto.

[4] *United Gas Pipe Line Co.*, 34 F.P.C. 892 (1965).

[5] United Gas Pipe Line Company, Docket Nos. RP71-29, RP71-120.

[6] *Monsanto Company* v. *FPC*, No. 71-1306 (C.A.D.C.).

[7] *Monsanto Company* v. *United Gas Pipe Line Co.* (D.D.C.) Civil Action No. 2037-71; order of dismissal on jurisdictional grounds appealed. *Monsanto Company* v. *United Gas Pipe Line Co.*, No. 72-1093 (C.A.D.C.).

The Commission has drawn this Court's attention to Monsanto's suits.[9] The purpose seems obvious. Starting with the unfounded assumption that the Federal Power Commission has and does regulate United effectively, this Court is to be induced to decide an extremely general question of Commission jurisdiction which may constitute a prejudgment of Monsanto's rights against United.

THE COURT MUST GET THE FULL FACTS BEFORE IT ACTS

The Commission infers that United's operations are no different than those of six other interstate natural gas pipeline companies recently curtailing gas service for reasons of gas supply deficiencies.[10] A comparison set forth in the margin shows that, in terms of the issue of firm service to direct industrial customers, United is in a class all by itself.[11]

[9] Petitions for Writ of Certiorari, n. 1 and 2.

[10] *Id.* at 13.

[11] United is the only major interstate natural gas pipeline company with a large number of firm direct mainline customers among the seven pipeline companies curtailing service.

Pipeline Company	*Number of Firm Direct Mainline Customers*	*Firm Direct Mainline Sales as Percentage of Total Annual Sales*
Arkansas Louisiana Gas Co.	0	0
Natural Gas Pipeline Company	2	0.898%
Panhandle Eastern Pipe Line Co.	0	0
Texas Eastern Transmission Corp.	0	0
Transcontinental Gas Pipe Line Corp.	1	0.290%
Trunkline Gas Company	1	0.005%
United Gas Pipe Line Company	237	37.445%

Source: FPC Form No. 2 for year 1970, Gas Operating Revenues, Customers and Sales.

United's situation is *unique* in a far more significant sense. Since the Fall of 1968 United has been allowed by the Commission to enlarge its service to some customers despite the fact that it faced an impending gas deficit. Until late 1970, it can be said now that the Commission did not know the true state of United's gas supplies. United concealed from the Commission the fact that confidential in-house studies showed as early as June 1968 that United's gas supplies were depleted to the point where deficits could be anticipated in 1968-1969 and succeeding winters.[11] Nonetheless, United initiated very large volumes of additional firm gas service in the Fall of 1968 and in every year since then.[12] The additional firm service could only be provided by curtailing firm service already being rendered to other customers.

Since November 1970, with the knowledge of the Commission, United has voluntarily and without re-

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[11] Monsanto's attorneys discovered the secret studies, made them available to the Commission and to the public, and introduced them into evidence in the 1971 proceedings before the Commission in Dockets RP71-29, *et al.* Appendix A contains Exhibit 30 from those proceedings which shows the deficits forecasted by the secret studies as early as 1968-1969 while the annual gas supply reports of United to the FPC on Form No. 15 showed no deficit before 1973. Ignorant of the misleading character of the data filed with it, the Commission authorized United in 1969 and 1970 to enlarge its service in reliance on the Form No. 15 reports.

[12] Since the Fall of 1969, when United now admits it first knew it was short of gas, United has added over 1,000,000 Mcf per day of additional firm service. Between the Fall of 1968 when United's secret studies show it anticipated a gas deficit and the Fall of 1969, United added another 385,000 Mcf per day of new firm service. These figures are taken from an affidavit filed by Mr. R. A. Ransom, consulting engineer, with the District Court in Monsanto's suit in Civil Action No. 2037-71. Mr. Ransom's knowledge of United's system goes back forty years.

straint by the Commission continued to enlarge service to preferred customers despite the fact that the pipeline's gas supplies were deteriorating and it could only provide the new service by further curtailing firm service to Monsanto and other firm customers.[13]

What United and the Commission characterize blandly as a curtailment plan is no less than a curtailment of firm service to its direct and wholesale firm customers which is the fruit of a deliberate and improvident policy of premature exhaustion of gas supplies through undertaking enlarged service which United's dedicated gas supplies could not possibly support.

The issuance of Opinion 606 afforded the Commission an opportunity to halt United's expansion of service. The Commission instead remanded the matter to the Hearing Examiner, thus assuring that Monsanto and other injured customers would receive no relief from the Commission for a matter of months.

Monsanto then turned to the United States District Court for the District of Columbia for help, seeking (1) an injunction prohibiting United from continuing to enlarge its firm service and from curtailing firm service to Monsanto in order to provide firm service to others already undertaken with knowledge of an impending gas deficit; (2) a declaratory order, in light of Section 7(a) of the Natural Gas Act[14] and *Granite City Steel Co.* v. *FPC*, 115 U.S. App. D.C. 392, 320 F.2d

[13] Since January 1971, United has enlarged service over 200,000 Mcf per day. Appendix B to this Reply contains a tabulation prepared by United and placed in the record before the Commission by Monsanto on July 15, 1971 which put the Commission on notice of these intended increases in service.

[14] 15 U.S.C. § 717f(a). The text is set out in Appendix C hereto.

711 (1963),[15] that United could not enlarge firm service to customers by curtailing existing firm service; and (3) damages for breach of contract since United began curtailing firm service in November 1970. The District Court dismissed the suit, and a companion suit brought by Texas Gulf Sulphur Company,[16] not because the claims for damages were unjustifiable or the need for injunction unwarranted, but on the grounds that the Commission had exclusive jurisdiction and administrative remedies had not been exhausted.

While the sale by United to Monsanto is non-jurisdictional under Section 1(b) of the Act,[17] the transportation of the gas was authorized by the Commission.[18] The abandonment provisions of the Natural Gas Act include both transportation and sale. *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83 (1966).

> "United was found 'able and willing . . . to perform the *service* . . .' for which it had volunteered. A certificate was accordingly issued and formally accepted by United. United now wishes to abandon the express service it agreed to perform * * * without a § 7(b) finding by the Commission 'that the present or future public convenience and necessity permit such abandonment.' This is precisely what the Act forbids."[19]

The Commission poses the question to this Court in terms of "curtailing" gas service, a term alien to the

[15] This case held that Section 7(a) means that persons "desiring gas for the first time, or desiring more gas, should not get it by taking it away from existing lawful customers." 320 F.2d at 713.

[16] *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, (D.D.C.), Civil Action No. 2253-71.

[17] 15 U.S.C. § 717(b). The text is set out in Appendix C hereto.

[18] *United Gas Pipe Line Co.*, 34 F.P.C. 892 (1965).

[19] 385 U.S. at 91 (footnote omitted.)

text of the Natural Gas Act. The Commission wants this Court to affirm its power to "accept, approve or amend" a curtailment plan, when it means approval of a plan to take firm gas service away from Monsanto and others without meeting the notice, hearing and decisional requirements of section 7(b). This is to be done, states the Commission, "to effect a fair allocation of natural gas supplies among all ultimate gas consumers"; when the Commission means a reallocation of of firm gas supplies away from Monsanto and other direct firm customers to provide firm gas service to other preferred customers receiving enlarged service for industrial and other purposes after United was short of gas and curtailing firm gas service. The Commission refers to the need to protect "domestic users" but fails to inform this Court that every contract between United and its customers gives first priority to domestic consumers.

PRIVATE SUITS FOR DAMAGES AND INJUNCTION CAN BE "A MOST EFFECTIVE WEAPON" FOR ENFORCING THE NATURAL GAS ACT

United's gas shortage came as no surprise to United. Its secret studies forecast the result. United could have forestalled the shortage by refusing to attach new service. Or, having chosen the course of adding service "by taking it away from existing lawful customers", *Granite City Steel Co.* v. *FPC, supra*, United had both the obligation and the time to file a petition with the Commission in accordance with the abandonment provisions of section 7(b) of the Natural Gas Act.

The Commission has gone out of its way in Opinion 606 to protect United from accountability for its reduction of gas service.

> "Implementation of the curtailment plan itself, pursuant to our procedures, would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts affected by curtailments that may be initiated in the Courts. * * *" [20]

We can only assume that the Commission is trying to draw this Court into approving this statement too. The very ambiguity over this purpose could be clarified by an order of this Court more narrowly delineating the issues here.

The primary purpose of the Natural Gas Act was to protect consumers from exploitation at the hands of natural-gas pipeline companies.[21] Protection of the pipeline company against suits by injured consumers arising from its violations of the Natural Gas Act, breach of trust and breach of contract would defeat this purpose as the Commission cannot grant reparations.[22]

The Commission's attempt to garner to itself total regulatory authority also ignores Section 22 of the Natural Gas Act.[23] This provision provides a supplemental means of enforcement at the behest of an injured person. The possibility of damage suits and injunctive relief represent "a most effective weapon" in the enforcement of obligations under the Act. To limit

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[20] Petitions for Writs of Certiorari, App. E, p. 69a. Dissenting Commissioner Carver opposed this statement: "A proper sense of comity in judicial-administrative relations calls for an abandonment of this fruitless attempt to delimit judicial remedy." (Petitions for Writs of Certiorari, App. F, p. 84a).

[21] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

[22] *Id.* at 618.

[23] 15 U.S.C. § 717u. The text is set out in Appendix C hereto.

an injured consumer to the processes of a Commission which has already failed to provide the protection necessary to avoid injury is not an acceptable alternative. The "hurdles that the victim might face * * * might well prove insuperable to effective relief." *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 435 (1964).

In *Borak*, a private suit relying upon a provision of the Securities Exchange Act of 1934 similar to Section 22 of the Natural Gas Act, this Court emphasized the remedial nature of the provision:

> "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). * * *" [24]

CONCLUSION

The reduction of service by United warrants immediate review by this Court. However, United is so unique both in terms of the nature of its market and its escape from regulation that these appeals should be limited to a determination of the legality of United's actions only. The record before the Commission in the proceedings in which Opinion 606 was issued is necessary to this review. That record is quite long. Respondents should have at least until April 28 to file their

[24] 377 U.S. at 433.

replies, should the Petitions for Writs of Certiorari be granted.

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February 1972

UNITED GAS PIPE

Comparison of anticipated gas deficiencies shown
Power Commission with anticipated deficits shown

(Volumes in M

Date of Report	*Type of Report*
May 1968	In-House study
September 1968	" "
October 1968	" "
12/31/68	Form No. 15
May 1969	In-House study
September 1969	" "
January 6, 1970	" "
12/31/69	Form No. 15
September 1970	In-House study
November 1970	" "
12/31/70	Form No. 15

[1] United actually curtailed firm service on its system in
[2] United began its current curtailment of firm service p
[3] Not available, 3/15/71.

LINE COMPANY

on Form No. 15 reports filed with the Federal
on contemporaneous "in-house" reports

f)

Year of first anticipated deficit	*Volume of anticipated deficit*
1968-1969	70,010 daily
1968-1969	24,425 daily
1968-1969	90,777 daily
1974	165,371,000 annual
1969-1970 [1]	367,390 daily
1969-1970 [1]	173,339 daily
1969-1970 [1]	176,119 daily
1974	69,367,000 annual
1970-1971 [2]	719,274 daily
1970-1971 [2]	697,260 daily
---- [3]	---- annual [3]

January and February 1970.
ogram on November 1, 1970.

APPENDIX B

4616

UGPL Co.
Average Day Requirements
In MCF/DAY @ 14.73 Psia

	Actual * January 1971	Actual ** January 1971	Estimated January 1972
Industrials	730	639	778
Power Plants	753	729	724
Pipe Lines	2114	2012	2127
City Gates	901	892	1113
Deliveries Buy-back	—	—	110
Company Use and Unaccounted for	32	32	32
	4530	4304	4881

* Total requirements (including curtailed volumes).
** Demand supplied (without curtailed volumes).

APPENDIX B

4616

UGPL Co.
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in MCF/DAY @ 14.73 Psia

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Demand Peg-back	—	—	110
Company use and unaccounted for	32	32	32
	4530	4304	4881

* Total requirements (including curtailed volumes).
** Demand supplied (without curtailed volumes).

Natural Gas Act, 15 U.S.C. §§ 717, *et seq*:

§ 717 NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

SECTION 1. (a) * * *

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

* * *

§ 717d EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE.

SECTION 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Com-

mission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. §717f (b)]

* * *

§ 717u JURISDICTION OF OFFENSES; ENFORCEMENT OF LIABILITIES AND DUTIES

SECTION 22. The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in [former] sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347).[11] No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this act. [52 Stat. 833 (1938); 15 U.S.C. § 717u]

SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
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Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Collateral Proceeding)

FEDERAL POWER COMMISSION, *Petitioner*
v.
LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Curtailment Proceeding)

UNITED GAS PIPE LINE CO., ET AL., *Petitioners*
v.
LOUISIANA POWER & LIGHT CO., ET AL.

UNITED GAS PIPE LINE CO., *Petitioner*
v.
LOUISIANA POWER & LIGHT CO., ET AL.
(FPC Opinion 606)

MOTION THAT THE COURT EN BANC CONSIDER THE PETITIONS FOR WRITS OF CERTIORARI TO REVIEW OPINIONS OF THE FEDERAL POWER COMMISSION

AND

MEMORANDUM UPON BEHALF OF RESPONDENTS MOBILE GAS SERVICE CORPORATION, ET AL., IN RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI AND IN SUPPORT OF MOTION FOR EN BANC CONSIDERATION

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MISCELLANEOUS:

Benton, Jurisdiction of the Federal Power Commission and of State Agencies in the Regulation of the Electric Power and Natural Gas Industries, 14 Geo. Wash. L. Rev. 53 (1945) 12

K. Davis, Administrative Law Text, 387 (West, 1972) 17

DeVane, Highlights of the Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938, 14 Geo. Wash. L. Rev. 30 (1945) 12

FPC Regulations Under the Natural Gas Act, 18 CFR § 154.23 13

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1 Moore's Federal Practice (Second Edition, revised 1971) 9

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-1016 and 71-1040

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Collateral Proceeding)

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.
(The Curtailment Proceeding)

UNITED GAS PIPE LINE CO., ET AL., *Petitioners*

v.

LOUISIANA POWER & LIGHT CO., ET AL.

UNITED GAS PIPE LINE CO., *Petitioner*

v.

LOUISIANA POWER & LIGHT CO., ET AL.
(FPC Opinion 606)

MOTION THAT THE COURT EN BANC CONSIDER THE PETITIONS FOR WRITS OF CERTIORARI TO REVIEW OPINIONS OF THE FEDERAL POWER COMMISSION

Respondents Mobile Gas Service Corporation, Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District hereby respectfully move that the Court *en banc* consider the petitions for writs of

certiorari insofar as they seek to have this Court review opinions of the respondent Federal Power Commission without awaiting a judgment of the court of appeals upon its review of those opinions.

This motion is made to obviate, or at least reduce, the possibility that a grant of certiorari might be followed, after briefs and oral argument, by a decision that the Court does not have jurisdiction and hence that certiorari had been granted improvidently. Such a decision would mean that the grant had delayed rather than expedited an authoritative resolution of the important issues raised by the claimed basis of the Commission's assertion of jurisdiction with respect to curtailment of the service obligations of United Gas Pipe Line Company and the rights of its customers.

Respectfully submitted,

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February 28, 1972.

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v.
LOUISIANA POWER & LIGHT CO., ET AL.
(FPC Opinion 606)

MEMORANDUM UPON BEHALF OF RESPONDENTS MOBILE GAS SERVICE CORPORATION, ET AL., IN RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI AND IN SUPPORT OF MOTION FOR EN BANC CONSIDERATION

This memorandum is submitted upon behalf of respondents Mobile Gas Service Corporation, Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District, in response to the petitions for certiorari and

in support of respondents' motion for Court consideration of those petitions *en banc* insofar as they seek review of Commission opinions. These respondents are local distributor gas utility customers of United Gas Pipe Line Company, respondent in No. 71-1016 and petitioner in No. 71-1040. They were parties[1] to the consolidated proceeding[2] before the Federal Power Commission (petitioner in No. 71-1016 and respondent in No. 71-1040) on United's petition, as supplemented, for a declaratory order[3] and on the changes in its filed rate tariff that United later filed.[4] Upon the Commission's issuance of its Opinion 606, which asserted "plenary jurisdiction" in that proceeding, and its Opinion 606A, which denied rehearing, these respondents duly sought review thereof in the United States Court of Appeals for the Fifth Circuit. They also inter-

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[1] Pet. (No. 71-1040) App. E, 83a and n. 1.

[2] *United Gas Pipe Line Company*, Docket Nos. RP71-29, RP71-120, RP71-99.

United Gas Pipe Line Company, petitioner before the Commission for declaratory orders in FPC Docket Nos. RP71-29 and RP71-99 and applicant in Docket No. RP71-120, from time to time sought Commission approval or authorization of a series of programs for curtailment of its delivery obligations. Pet. (No. 71-1040), App. E, 55a-56a, 58a-59a, 74a-75a.

[3] Under § 554(e) of the Administrative Procedure Act, 5 U.S.C. 554(e), R. 865. (The "R" references herein are to the record of the Commission proceedings in Dockets RP71-29, RP71-120, RP71-99 as certified to the court of appeals.)

[4] RP71-120; Pet. (No. 71-1040); App. E, 58a-59a. United's filing was made under the provisions of the Natural Gas Act that require notice of rate changes. Sections 4(d) and 4(e) of the Natural Gas Act, 52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. 717c(d) and 717c(e); Pet. (No. 71-1040), App. D, 45a-46a; see *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 339, 342-343 (1956).

vened in other proceedings in that court for review of the same opinions.[5]

These respondents, emphatically, want the earliest possible authoritative resolution of the questions raised by Opinions 606 and 606A (and by the January 14 decision of the court of appeals in the collateral proceeding) as to the Commission's jurisdiction over curtailments of United's service obligations. They agree that it is of great importance to the public interest that such a resolution be expedited.

QUESTIONS PRESENTED

(I) In the view of these petitioners the Commission's opinions raise the following question as to its curtailment jurisdiction:

Where an interstate natural gas pipe line has a gas shortage because it has greatly increased its service obligations without a proportionate increase in its gas reserves, has Congress authorized the Commission to

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[5] The three named respondents on January 24, 1972, filed a timely joint petition in the Fifth Circuit (No. 72-1157) for review of the Commission's order of October 5, 1971, in the Curtailment Proceeding, *United Gas Pipe Line Company*, Docket Nos. RP71-29, RP71-120, RP71-99 (Opinion No. 606; Pet. (No. 71-1040) App. E, 55a *et seq.*); rehearing denied December 3, 1971 (Opinion No. 606 A, *id.* 83a). They have also sought and been permitted to intervene in four other proceedings in that court on petitions for review of the same order filed by Louisiana Power & Light Co., *et al.* (No. 71-3429), Gulf States Utilities Co. (No. 71-3627), Mississippi Power & Light Co. (No. 72-1003), and State of Louisiana, *et al.* (No. 72-1220), by orders of January 11, and February 7 and 16, 1972. Petitioners' briefs in those proceedings are due March 3, 1972. (These respondents were not parties to No. 71-2550 in which the Fifth Circuit on January 14, 1972, entered its opinion (Pet. (No. 71-1040) App. A, 1a, *et seq.*) reversing the district court's dismissal (*id.* App. C, 30a, *et seq.*) and remanding with directions the Collateral Proceeding).)

relieve the pipeline of some of its obligations (depriving its customers of their corresponding rights to service) without a hearing or without an application either under section 7(b), for authority to abandon part of its service, or under section 7(c) for certificate authorization for the changed service made necessary by its shortage?

(II) These petitioners generally accept petitioners' statements of the question raised by the court of appeals' decision on the question of the Commission's jurisdiction over transportation of natural gas to serve non-jurisdictional-sale customers by means of certain facilities.

DISCUSSION

I. THE COURT EN BANC SHOULD CONSIDER THE QUESTION OF ITS JURISDICTION

This Court, before taking the unprecedented action[6] of granting certiorari to review an administrative agency's opinions prior to judgment by the court of appeals on review thereof, should consider two questions: (A) whether to do so would delay, not expedite, an authoritative resolution of the important question raised by the Commission's opinions, if this Court should later determine that it lacks appellate jurisdiction until after court of appeals' judgment; (B) whether the broad questions presented by the petitioners as to the Commission's curtailment jurisdiction are ripe for this Court's review, where United has made no effort to invoke, and the Commission has not articulated any consideration of, the particular provisions of the Gas Act that are the only possible sources of such jurisdiction under the principles established by this Court's

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[6] Stern and Gressman, *Supreme Court Practice*, 28-30 (Fourth Edition, 1969).

decisions and by other judicial, and Commission, precedents? Petitioners believe that the answer to each question will require denial of the petitions for review of the Commission opinions.

A. Grant of Writs of Certiorari Might Only Delay Authoritative Decision of the Important Question Raised by Opinion 606.

Grant of certiorari would delay rather than expedite an authoritative resolution of the question raised by Commission Opinion 606 if, after briefs and oral argument, the Court were to conclude that prior to final judgment by the court of appeals this Court has no jurisdiction under Article III, Section 2, Clause 2, of the Constitution,[7] 28 U.S.C., 1254(1), and section 19(b) of the Natural Gas Act.[8] For this reason these respon-

[7] Article III, Section 2, Clause 2, reads as follows: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned [i.e., those to which clause 1 provides "the judicial Power shall extend"], the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make."

[8] Section 19(b) of the Natural Gas Act (52 Stat. 831 (1938); 15 U.S.C. § 717r(b); Pet. (No. 71-1040) App. D, 52a-53a), provides in pertinent part as follows: "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order of the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia . . . by filing . . . a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. . . . The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28."

dents, by motion submitted herewith, are asking the Court to determine whether this novel question of the Court's appellate jurisdiction should be passed on now by the Court *en banc* to avoid the possibility that an improvident grant of certiorari under the so-called "rule of four" might defeat the very end sought by petitioners.

The special provision of the Gas Act conferring exclusive jurisdiction on United States Courts of Appeals to review Federal Power Commission orders under that Act, and providing that the judgment of such court on such review "shall be final subject to *review* by the Supreme Court" [emphasis supplied] constitutes a "distinctive formulation of the conditions under which resort to the courts may be made. . . ." *FPC* v. *Pacific Power & L. Co.*, 307 U.S. 156, 159 (1939).[9]

It would seem that such a special grant of "exclusive" review jurisdiction to the courts of appeals[10] until they reach final judgment has the effect of denying review jurisdiction to this Court on certiorari until then under a line of precedents that goes back to the earliest days of the Court. *Wiscart* v. *D'Auchy*, 3 Dall (3 U.S.) 321 (1796); *Durousseau* v. *United States*, 6 Cranch (10 U.S.) 307, 311 (1810); *Ex Parte Vallandig-*

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[9] Section 19(b) of the Gas Act is the counterpart of Section 313(b) of the Federal Power Act (49 Stat. 860, as amended, 16 U.S.C. 825l. The pertinent parts of 19(b) quoted in note 8, *supra*, are identical to those of 313(b) involved in *Pacific Power*, except for the substitution of the words "natural gas company" for the words "licensee or public utility." See also *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 211-212 (1964).

[10] The jurisdiction thus conferred has been held exclusive of district court jurisdiction conferred by an earlier, not expressly repealed statutory provision. *Safe Harbor Water Power Corp.* v. *FPC*, 124 F.2d 800, 803-805 (3rd Cir. 1941), *certiorari denied*, 316 U.S. 663.

ham, 1 Wall (68 U.S.) 243, 251 (1864); *Ex Parte McCardle*, 7 Wall (74 U.S.) 506, 513-15 (1869); *The "Francis Wright,"* 105 U.S. 381, 385 (1881); *American Construction Co.* v. *Jacksonville, (Etc.) Ry.*, 148 U.S. 372 (1893); *Colorado Central Consolidated Mining Co.* v. *Turck*, 150 U.S. 138, 141 (1893); *Missouri* v. *Pac. Ry. Co.*, 292 U.S. 13, 15 (1934); *Stephan* v. *United States*, 319 U.S. 423, 426 (1943); *The Glidden Co.* v. *Zdanok*, 370 U.S. 530, 567-68 (1962); *Flast* v. *Cohen*, 392 U.S. 83, 109 (1968, concurring opinion); 1 Moore's Federal Practice ¶ 0.7[2] (Second Edition, revised 1971).

B. It Is Doubtful That the Broad Questions of Curtailment Jurisdiction Presented by the Petitions Are Ripe for This Court's Review.

Each petition presents its question relating to the Commission's curtailment jurisdiction in the broad terms of jurisdiction (or authority) under the entire Gas Act. Moreover, each involves the unprecedented[11] and constitutionally dubious asserted Commission authority, by the mere acceptance of United's tender of a change in its filed rate tariff, to immediately and with finality relieve United of legal obligations to serve its customers[12] (and to deprive its customers of their

[11] The attempt of the Commission to curtail service under the rate sections of the Act in *City of Detroit* v. *Panhandle Eastern Pipe Line Co.* (6 F.P.C. 196 (1947)), was made effective only after notice, hearing, and findings. See *infra*, p. 12, and n. 24.

[12] Such obligations may exist under (1) its contracts (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338-339 (1956)); (2) its certificates of public convenience and necessity issued by the Commission (*United Gas Pipe Line Co.* v. *FPC*, 383 U.S. 83 (1966); *Sun Oil Co.* v. *FPC*, 364 U.S. 170 (1960)); (3) its historical service-pattern (*Granite City Steel Co.* v. *FPC*, 115 U.S. App. D.C. 392, 394, 320 F. 2d 711, 713 (1963)); or (4) the Gas Act, of itself, directly (*J. M. Huber Corp.* v. *FPC*, 236, F. 2d 550, 556-557 (3rd Cir. 1956)).

rights to be served) [13] during the pendency of the very hearing the Commission found necessary to determine whether such changes are lawful.[14] And this, without any provision for indemnification of persons injured by any curtailments ultimately determined to be lawful.[15] The obvious Due Process question has been wholly ignored by petitioners.

Two questions arise. The first is whether such a filing of a rate tariff change and acceptance thereof by the Commission under sections 4(d) and 4(e) of the Act can effectuate any change in United's legal obligations, absent power otherwise derived by United, to make such a change in service. For sections 4(d) and 4(e) are not a grant of power to change, but a prohibition of change without giving notice by such filing. United's power to make such change depends on provisions of the sections of the Act not invoked here because United did not file the prescribed application.

The resulting question is whether the issue thus presented is ripe for review by this Court, inasmuch as neither petition has addressed itself to the question of ripeness of the question of the Commission's overall

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[13] R. 9134-40; Pet. (No. 71-1040), App. E, 75a, 79a.

[14] Pet. (No. 71-1040), App. E, 57a.

[15] The rate sections of the Act in terms purport to authorize or provide two methods of indemnification: (1) up to five months suspension of the operation of the new rate (Pet. (No. 71-1040), App. D, 45a-46a), see *Hope Natural Gas Co.* v. *FPC*, 196 F. 2d 803 (1952), rehearing denied, 197 F. 2d 522 (1952); (2) bond for refund of any excess of the changed rates collected not ultimately found justified (*id.* 46a). The refund of excess collections has no relevance to a curtailment of service and the Commission's refusal to suspend in RP71-120 for more than a nominal one day highlights the constitutional infirmity of its interpretation. R. 9185; Pet. (No. 71-1040), App. E, 79a, 81a.

curtailment powers where its powers under the service provisions have not been invoked. The answers to these questions must start with an understanding of the Commission powers that were attempted to be invoked in the proceedings before it.

The limited basis of Commission jurisdiction actually invoked.—The Commission proceeding was begun by United's filing of a petition under section 554(e) of the Administrative Procedure Act [16] for a declaratory order approving a newly proposed interpretation of its existing filed rate tariff as giving it the right, in the event it did not have enough gas to supply the requirements of all its customers, to curtail its jurisdictional-sale customers ratably with its non-jurisdictional-sale customers, on the volumes of gas used for industrial purposes. United obviously expected that a favorable ruling, even though issued after the end of the program of curtailments based on that interpretation for the 1970-71 winter heating season then just beginning, would retroactively absolve it from any legal liability arising out of those curtailments.

But United's new interpretation was challenged on the grounds that it is contrary to the unambiguous meaning of its tariff;[17] that that meaning had been corroborated by the actual curtailments United had made in the 1969-1970 winter to meet the onset of its present shortage,[18] and by United's ensuing explanation of the rights of its customers;[19] and that it accorded with the dominant purpose of Congress in passing the Gas Act

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[16] 5 U.S.C. § 554(e).

[17] R. 8669; 8703; 9018-21; 9024; 9083-86.

[18] R. 1188-89.

[19] R. 1252, 1254-1258, 2333-2334.

to protect the consuming public served by local distributors that are dependent on out-of-state gas, from the "Attleboro Gap" in the regulatory jurisdiction of the state agencies.[20]

For the next winter, 1971-1972, United filed a revision of its tariff, which included provisions corresponding to the interpretation for which it had sought Commission approval, as a tariff change under sections 4(d) and 4(e).[21]

Thus the only attempts that have yet been made to invoke Commission curtailment powers all depend on the proposition that a pipeline's filed rate tariff fixes its service obligations, and that a change in the filed tariff can change those obligations.

Insufficiency of that basis under principles of decisions of this Court.—While a jurisdictional pipeline's contracts, or "service agreements," with its customers may throw light on what the pipeline's service

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[20] Section 1(a) of the Gas Act (Pet. (No. 71-1040), App. D, 43a. ". . . The Act, though extending federal regulation had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. . . ." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 517 (1947).

See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 681-684 (1954); *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 212-214 (1964); DeVane, *Highlights of the Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30 (1945) ("a new pattern of federal and state relationship," p. 35); Benton, *Jurisdiction of the Federal Power Commission and of State Agencies in the Regulation of the Electric Power and Natural Gas Industries*, 14 Geo. Wash. L. Rev. 53, 55-56, 64, 69-70, 71-72 (1945).

[21] Pet. (No. 71-1040), App. D, 45a-46a; *id.* App. E, 58a-59a.

obligations are, they do not limit those obligations.[22] *Sun Oil Co.* v. *FPC*, 364 U.S. 137, 143, 153, 155, 156 (1960). Hence United's filed tariff cannot be treated as limiting its service obligations, because the provisions of its service agreements here involved are prescribed by its filed tariff and the service agreements incorporate the pertinent parts of the tariff.

Moreover, *United Gas Pipeline Company* v. *Mobile Gas Service Co.*, 350 U.S. 332, 339, 342-343, makes specifically clear, at least with respect to changes in rates, that section 4(d)

> . . . is simply a prohibition, not a grant of power. . . . The section says only that a change *cannot* be made without proper notice to the Commission; it does not say under what circumstances a change *can* be made. . . . If the purported change is one the natural gas company has the power to make, the "change" is completed upon compliance with the notice requirement. . . .

What is thus true for changes in rates must necessarily be true for changes in service, for both are covered by the same statutory words, with nothing in the circumstances to warrant distinction. In the case of a change in service, the required "power" to make a change in service depends on the pipeline's compliance

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[22] The Commission's own regulations provide that the filing of rate schedules does not dispense with the necessity for certificate authorization. 18 C.F.R. § 154.22.

The Commission's administration of the certificate provisions of the Act has left much to be desired so far as the definition of service obligations is concerned. In the not unusual absence of adequate documentary definition, the pattern of the service that has actually been rendered may be determinative. *Granite City Steel Co.* v. *FPC*, 115 U.S. App. D.C. 392, 320 F.2d 711, 713 (1963). Historically, United has supplied "all requirements" of its gas utility customers and ignored the contract maximum limitation. R. 845, 2309, 2331-2333, 2336-2337.

with the provisions of section 7 relating to service. *Cf., South Georgia Natural Gas Co.*, 23 F.P.C. 795, 797 (1960), on which Opinion 606 relies.[23] There has been no such compliance here.

Conflict in principle with Sixth Circuit decisions.— The Commission's only previous attempt to curtail service under the rate sections of the Act was a series of annual orders growing out of the post-World War II failure of one jurisdictional pipeline to increase its transmission capacity rapidly enough, and the resulting shortage of gas to meet its customers' requirements. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 F.P.C. 196 (1947). None of those orders was judicially reviewed. But the Commission's claimed basis for its curtailment rules in the rate sections of the Act was impliedly rejected in collateral litigation.[24]

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[23] Pet. (No. 71-1040) App. E, 64a-65a. In *South Georgia* the Commission required a jurisdictional pipeline to apply for a new certificate for a changed service that consisted of selling gas to a municipality for its own boiler fuel use under a separate non-jurisdictional contract where the gas had formerly been sold under a jurisdictional service agreement that covered both supply of gas for that purpose and for resale by the municipality. The Commission denied a certificate for transportation for the new service. Court review was not sought.

See also *Dixie Pipe Line Co.*, 14 F.P.C. 106 (1955).

[24] Twice the Sixth Circuit declared that the Commission's order had been accepted as valid for the purpose of the case before it, but each time, in holding that a complaint for injunctive relief from the curtailment should be dismissed for failure to exhaust administrative remedies before the Commission, it pointedly ignored the Commission's claimed basis of jurisdiction. In one case it held that the Commission had jurisdiction under the provisions of section 7(a). (Pet. No. 71-1040) App. D, 47a-48a) relating to improved or new service (*Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 788-89 (6th Cir. 1949)); in the other, under the provisions of section 7(b) (*id.* 48a) relating to abandonment of service (*Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 117 F. 2d 942, 943, 945 (6th Cir. 1949)).

Lack of support in the cited cases.—In relying on *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 523 (1947),[25] as implying that the Commission has curtailment jurisdiction, Commission Opinion 606 omits a footnote [26] to its quotation from that opinion [27] which plainly suggests that the Court's reference to the Commission's jurisdiction was a reference to its section 7(e) [28] authority to condition certificates issued under section 7(e) of the Act.

All of the other cases cited in Opinion 606 to support jurisdiction founded on the rate filing sections involve the exercise of jurisdiction under the service provisions of section 7.[29]

The limitations on such curtailment powers as have been conferred on the Commission may not be circumvented.—The benefits obtainable under the service provisions of the certificate sections of the Act (sections 7(b) and 7(c) are available only on application (*United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83, 91 (1966)), and then only prospectively after notice, hear-

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[25] Pet. (No. 71-1040) App. E, 62a-63a, 64a, 70a-71a.

[26] 332 U.S. at 523, n. 23.

[27] Pet. (No. 71-1040), App. E, 63a.

[28] Pet. (No. 71-1040), App. E, 49a-50a.

[29] *Michigan Consolidated Gas Co.* v. *FPC*, 203 F.2d 895, 900, 204 F.2d 675 (3rd Cir. 1953); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 226 F.2d 60 (6th Cir. 1955), *certiorari denied*, 350 U.S. 987 (1956) (nothing in this case indicates any change in the Sixth Circuit's position in the earlier cases discussed, *supra*, p. 14, n. 24); *Panhandle Eastern Pipe Line Co.* v. FPC, 232 F.2d 467, 471-472 (3rd Cir. 1956), *certiorari denied*, 352 U.S. 891 (1956).

ing, findings, and issuance of an order.[30] These requirements and limitations have regard for the substantive rights of the affected customers and are not to be circumvented by saying, "The form of filing is not the controlling consideration," as Opinion 606A says, or as Opinion 606 suggests, that the assumed purpose of one section of the Act can be carried out by the exercise of the power conferred by another section,[31] without regard to the manifest limitation of the assumed purpose by the limitation of the powers specifically provided for its implementation.[32]

The Commission itself has recognized its inability to support its present jurisdictional claim. About the time United initiated the curtailment proceeding, the Commission asked Congress for new legislation to give it the jurisdiction it now claims it already has.[33]

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[30] Sections 7(c) and 7(e), Pet. (No. 71-1040), App. D, 48a-50a. Temporary certificates may be issued *pendente lite* only under rigidly circumscribed conditions, to "maintain," not curtail service, and only to persons who have made application for a permanent certificate (section 7(c), *id.* 49a).

[31] Pet. (No. 71-1040), App. E, 85a; *id.* 65a.

[32] The attempted use of the statutory rate filing provisions as authority for changes in service obligations and rights but without suspension of the changes or indemnification for any damages from the interim implementation of any changes ultimately found unlawful (*supra*, p. 8, n. 15), and the prolongation of the proceedings beyond the end of the season involved, coupled with the repetition of the entire process season after season, accompanied by unabashed proclamations that judicial protection and relief are unavailable (*supra*, p. 8, n. 13), have deeply disturbing overtones.

[33] "Spot shortages of natural gas which became apparent during the fiscal year and which are expected to increase in the foreseeable future suggest urgent need for congressional action to alleviate these problems and that the Commission's jurisdiction to do so should not be subject to challenge. This proposal which would add a new subsection to section 7 of the Natural Gas Act would enable

II. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE SUMMARILY REVERSED FOR FAILURE TO FOLLOW THE EXHAUSTION RULE.

The first time this Court was presented with a Federal Power Commission petition for certiorari to review a court of appeals judgment like that of the court of appeals in the Collateral Proceeding, this Court summarily reversed the court of appeals by a *per curiam* opinion announced four days after oral argument. *FPC* v. *Arkansas P. & L. Co.*, 330 U.S. 802, rehearing denied, 330 U.S. 856 (1947). The court of appeals in its January 14, 1972, opinion did not undertake to explain its failure to follow *Arkansas Power & Light* or how it reached the conclusion it did by applying Professor Davis' "three-part test."[34]

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the Commission to determine when an emergency exists so as to require the construction of temporary connections of facilities and extensions of facilities and the delivery, interchange, transportation, *load curtailment and allocation of gas by any gas company*, whether or not it is otherwise subject to the Commission's jurisdiction. Undisputed authority to meet such crises as they arise is necessary for effective regulation of the natural gas industry. [Emphasis supplied.]" (FPC, Annual Report, 1970 (January 21, 1971), 8.)

[34] Pet. (No. 71-1040), App. A, 25a-26a. None of the three "factors" Professor Davis proposes as bases for reconciliation of the differences he finds in the decisions in his most recent volume (Davis, Administrative Law Text, 387 [West, 1972]) affords any basis for the conclusion reached by the court of appeals. They are: ". . . extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and specialized administrative understanding in the question of jurisdiction. . . ."

The last factor would seem clearly not to support the court of appeals conclusion. *Cf. FPC* v. *Florida P. & L. Co.*, — U.S. —, 30 L. Ed. 2d 600 (January 12, 1972), reversing 430 F.2d 1377 (5th Cir. 1970). The second factor is immaterial here, for the Commission's jurisdiction to determine its own jurisdiction in such circumstances has been well established since *Jersey Central P. & L. Co.*

These respondents therefore submit that the Court should again enter a summary reversal of the court of appeals failure to follow the exhaustion rule, this time on the petitions for certiorari and responses. If this is done, the questions of the merits of the court of appeals ruling on jurisdiction will not be taken up with the tunnel vision that would be imposed if review of that ruling were to be undertaken apart from the record and Commission opinions 606 and 606A.

CONCLUSION

(1) For the foregoing reasons there is serious doubt, wholly apart from the question of this Court's jurisdiction under the Constitution and section 19(b) of the Gas Act, that the broad questions presented by the petitions as to the Commission's powers to curtail service obligations are now ripe for this Court's review, in view of the failure to invoke or consider the only provisions of the Act that Commission or court precedents have suggested may confer such jurisdiction. If not, granting these petitions may not expedite the needed authoritative determination of those questions.

It would also seem, with all deference, that in the unusual circumstances here involved, the Court's jurisdiction to review the Commission's opinions pursuant to these petitions should be considered by the Court *en banc* and denied.

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v. *FPC*, 319 U.S. 61 (1943). The first factor here calls for a balancing of injuries among classes of customers, and the district court is in no position to weigh the injuries to Louisiana P. & L. Co. against those to United's other classes of customers. The gas that is allowed to direct industrial customers is gas withheld from the public served by United's jurisdictional sale customers. In this particular respect (see the Commission's opinion on the jurisdictional question, which has already been issued, Pet. (No. 71-40), App. F, 91a), the "injury factor" would seem immaterial.

(2) The court of appeals judgment on appeal from the district court should be summarily reversed for failure to follow the exhaustion rule.

Respectfully submitted,

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February 28, 1972.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents*

(The Curtailment Proceeding)

No. 71-1040

UNITED GAS PIPE LINE CO., *Petitioner,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents*

(FPC Opinion 606)

BRIEF FOR MISSISSIPPI POWER & LIGHT COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The Petitions make adequate reference to the fact that the case is now pending in the court below. That court has neither heard the case on its merits nor issued an opinion. The Petitions make adequate reference to the Commission's opinion in the case and the opinion denying rehearing. Because the Commission's opin-

ions as well as the court opinions in the so called collateral case have not been reported but are contained as appendices in the Petition, this Brief shall make references to the appendices where appropriate.*

JURISDICTION

Because this curtailment proceeding arises from Opinion No. 606 of the Federal Power Commission, which is the determination of an administrative agency and not a court, and which Opinion is pending review before the Court of Appeals, the jurisdiction attempted to be invoked would be original rather than appellate in nature, and hence should be denied.

QUESTIONS PRESENTED

1. Whether this Court should assume jurisdiction to review an order of an administrative agency when such order is before a Court of Appeals for review.

2. If such administrative order were properly before the Court for review, whether the Federal Power Commission has jurisdiction under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, to order curtailments of natural gas by an interstate pipeline company to a direct purchaser of such gas in a manner contrary to the terms of the contract between the interstate pipeline company and the direct purchaser.

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* The Petitions of both the Federal Power Commission and United Gas Pipe Line Company, which are opposed by this Brief, relate to the same issue of Commission jurisdiction, arise from the same Commission Opinion No. 606 and seek a writ of certiorari to the same Court of Appeals. Although this Brief will answer specifically only the issues raised by the Commission's Petition, it will be equally applicable to those raised in United's Petition. The references made in this Brief will be to the Commission's Petition and Appendices.

STATUTES INVOLVED

The statutory provisions involved are set forth in the Petitions.

STATEMENT OF THE CASE

This case involves questions arising from a proceeding before the Federal Power Commission which was initiated by United Gas Pipe Line Company (United), a natural gas pipeline company subject to the Commission's jurisdiction. Alleging that its gas supply was insufficient to meet its total contractual obligations, United filed a curtailment plan with the Commission and requested an order approving it. This plan not only contemplated curtailment of deliveries of gas to United's resale customers, which sales are jurisdictional, but also sought Commission approval of curtailments of deliveries to direct sales customers in violation of their contracts with United, despite the fact that such direct sales are not subject to the Commission's jurisdiction.

A number of parties intervened and participated in the proceeding, including Mississippi Power & Light Company (MP&L). MP&L is an electric utility operating entirely within the State of Mississippi. It is a direct customer of United purchasing gas for consumption in its electric generating plants, but purchases no gas for resale.

MP&L and others took the position that since the Commission has no jurisdiction over direct sales, such as those made to MP&L by United, it has no power to authorize United to curtail deliveries of natural gas to direct sales customers in violation of their contracts with United. MP&L takes no position on the Com-

mission's jurisdiction to permit curtailment of deliveries to resale customers.

In Opinion and Order No. 606, issued October 5, 1971, (Petition App. E, pp. 48a-76a), the Commission held that it had plenary jurisdiction under the Natural Gas Act to accept, approve, or modify United's curtailment plan. The Opinion stated as justification for this holding the Commission's authority to regulate transportation of natural gas in interstate commerce under Section 1(b) of the Natural Gas Act and its authority to prohibit discrimination under Sections 4(b) and 5(a) of the Act. In addition, Opinion No. 606 stated that implementation of United's curtailment plan "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief" under United's contracts with its customers which might be initiated in the courts. (Petition App. E, p. 69a).

On December 3, 1971, in Opinion No. 606-A (Petition App. F, pp. 77a-84a), the Commission denied nine timely petitions for rehearing including one filed by MP&L. MP&L's Petition specifically stated that (1) the Commission erred in finding that it has jurisdiction to allocate gas in a manner inconsistent with direct sales contracts, and (2) that the Commission erred in stating that implemention of United's curtailment plan in a manner consistent with Opinion No. 606 would be an absolute defense for United against all claims for relief under the direct sales contract between United and MP&L.

MP&L and five others have filed timely petitions for review with the United States Court of Appeals for the Fifth Circuit. By order issued January 28, 1972,

four of the six cases, including the one involving MP&L, were consolidated for further proceedings. The other two cases were consolidated with the first four by order issued February 16, 1972.

Besides the proceeding in the Fifth Circuit arising out of Opinion No. 606 (hereinafter called the "curtailment proceeding" for ease of identification), the Commission also is seeking a writ of certiorari in the Petition to review the judgment of the Fifth Circuit in *Louisiana Power & Light Company* v. *United Gas Pipe Line Company, et al.*, No. 71-2550, issued January 14, 1972 (the "judgment proceeding"). MP&L was not a party to the judgment proceeding and, hence, this brief in opposition is limited to the curtailment proceeding. Accompanying the Petition was a Motion for Expedited Consideration ("Motion").

ARGUMENT IN OPPOSITION

A. Certiorari Before Judgment Should Not Be Granted

The Commission has asked this Court to issue a writ of certiorari to the Fifth Circuit not only before judgment but before that court has even had a chance to read the first brief in the proceeding.* The basis for seeking this extraordinary and perhaps unconstitutional remedy is that this curtailment proceeding has a common issue with the judgment case, i.e., the question of the Commission's basic jurisdiction to order curtailments to direct customers of interstate pipeline companies.

Admitting that "this Court's power to issue a writ of certiorari before judgment in cases coming directly to the courts of appeals from administrative agencies

* Initial briefs are due on March 3, 1972.

has never been definitively determined" (Petition, p. 21), the Commission asks this Court to chart a new course with no showing whatsoever of the need for early action on the curtailment case. While emphasizing the need for expedition, the Petition itself gives the impression that such expedition may not really be required in the curtailment case because it still seeks early briefing and argument if only one of the petitions is granted[*] (Motion, p. 2, Petition, p. 23). There would be no point in expediting briefing and argument in the judgment case if an early determination in that case alone were of no benefit in determining the jurisdiction question.

Returning to the question of whether this Court can, in fact, review the administrative decision prior to judgment in the Fifth Circuit, it appears that this issue never has been squarely ruled upon by this Court. However, the treatise writers have serious doubts about this Court's jurisdiction in such a situation. Stern and Gressman, *Supreme Court Practice*, pp. 28-30 (4th ed., 1969), notes that:

> A possible exception to the Court's power to issue a writ of certiorari before judgment is the class of cases coming to the courts of appeals directly from administrative agencies. In such circumstances it could be said that the Supreme Court, by injecting itself into the case prior to any judicial action by a lower court, would be exercising original jurisdiction outside the constitutional pattern. . . .

Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 132 (2d ed. Wolf-

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[*] It obviously would not be appropriate to grant certiorari in the curtailment case and not in the judgment case.

son & Kurland 1951) has similar doubt as this Court's jurisdiction:

> It has been suggested that the Supreme Court may not have jurisdiction to grant certiorari before judgment to a Court of Appeals where the proceeding originated not in a District Court but in an administrative tribunal. The theory is that in such a case not the appellate, but the constitutionally limited original, jurisdiction of the Supreme Court would be involved.
>
> Certiorari before judgment was granted in *Ickes* v. *Associated Industries* although the case originated in an administrative tribunal; but in that case an order had been entered which the Supreme Court could affirm, reverse or modify. Where there is no such order, the power of the Supreme Court to grant certiorari before judgment in a case originating in the Court of Appeals is far more doubtful. (Footnotes omitted).

The Petition makes no claim that this proceeding is the type of case that can be heard by this Court under its original jurisdiction because it is obvious that under no stretch of the imagination could Article III, Section 2 of the Constitution be interpreted to include this type of proceeding.

The argument is made that "in our view, however, review of an agency decision in a case where the agency has acted in a quasi-judicial capacity is appellate in nature." (p. 22). The only basis given for this assertion is this Court's opinion in *Marbury* v. *Madison*, 1 Cranch 137 (1803). This is a fine old case but it is difficult to see its relevance to the present situation.*

* We are also asked to "compare" *Wheeler Lumber Bridge & Supply Company* v. *U. S.*, 281 U.S. 572 (1930) but such a comparison reveals that *Wheeler* involved the certification of a question of law from the Court of Claims, not an agency.

The Federal Power Commission is not a court and its creation by the Congress constituted a delegation of its *legislative* powers. A landmark decision on the nature of administrative agencies is *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Describing the Federal Communications Commission as an agency to which Congress had delegated authority "to carry out its legislative authority," this Court's opinion emphasized the difference between a court and an administrative agency, such as the Federal Communications Commission and the Federal Power Commission. In *Pottsville* the Court of Appeals had invoked against the Federal Communications Commission the doctrine that a lower court is bound to respect the mandat of an appellate tribunal and cannot reconsider questions which the mandate has laid to rest.

This Court held that the basic issue in the case was the Court of Appeals' failure to recognize the difference between a court and an administrative agency. Noting that "[t]his was not a mandate from court to court but from a court to an administrative agency" (309 U.S. 134, 141), this Court held that "to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes" of administrative agencies and to "disregard the traditional scope" of the courts (309 U.S. 134, 142).

In *Evans* v. *FCC*, 113 F. 2d 166 (1940), the District of Columbia Circuit interpreted the *Pottsville* decision (113 F. 2d 166, 168):

> [T]he foundation of the Pottsville decision is that proceedings before the Commission are *administrative, not judicial in character.* (Emphasis supplied).

From the foregoing, it is apparent that the Commission is asking this Court to undertake a radical assertion of jurisdiction that is at best of questionable constitutional validity. It is suggested that caution in taking such a step should be employed even if there were a compelling need for immediate action by this Court. Such is certainly not the case here. The question of the Commission's curtailment jurisdiction is present in the judgment case. There is no emergency requiring immediate review by this Court of the curtailment case.

The Petition complains that the forthcoming "summer months are critical to the natural gas industry" and that pipelines must be in a position to interrupt direct as well as resale customers so as to inject gas into storage. The Petition fails to note, however, that United has been operating under a curtailment program for over a year.

The curtailment case can have no adverse effect this summer on United or any other pipeline. It is the Commission's holding which is being appealed and as there is no stay of that holding, the Commission can hardly complain that a full consideration by the Fifth Circuit will interfere with United's curtailment program.

Additionally, Section 19 of the Natural Gas Act, which governs appeals, contains no provision for the Commission to appeal its own order. It states simply that:

> (b) Any party to a proceeding under this act *aggrieved by an order issued by the Commission* in such proceeding may obtain a review of such order *in the circuit court of appeals* of the United States for any circuit wherein the natural gas

> company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. (Emphasis supplied)

Since the Commission cannot be aggrieved by its own order, there is no provision in the Natural Gas Act for appeal of Opinion No. 606 by the Commission. Further, the Act specifically provides for appeals of Commission orders by proper parties in *courts of appeals* and does not make any provision for appeal to the Supreme Court. These are fatal defects in the Petition and cannot be cured simply because the Commission thinks the Fifth Circuit may have prejudged its case (Petition, p. 13).

The only issue common to the two proceedings is the Commission's curtailment jurisdiction. The second issue involving Commission certificate jurisdiction over certain of United's facilities is not involved in the curtailment case. In urging this Court to grant a writ of certiorari before judgment in the curtailment case, the Petition states (pp. 12-13):

> Although we are petitioning for writs of certiorari in both the curtailment and [judgment] cases, we believe the issue on which we seek review—i.e., the Commission's ultimate authority over curtailments—is squarely presented in the [judgment] case decided by the court of appeals. Since the court of appeals' decision on the jurisdictional issue in the curtailment case is foreordained by its decision in the [judgment] case, we urge the Court also to grant a writ of certiorari before judgment in the curtailment case so that the

> issue of the Commission's jurisdiction will be presented *in the context of a full administrative record.* (Emphasis supplied).

This position seems inconsistent. If, as the Commission asserts, there is a common *issue of law* in both cases, why is there any need for a factual administrative record? If a "full administrative record" is of any significance, why is the Fifth Circuit's decision as to the jurisdictional issue "foreordained by its decision in the [judgment] case"? In other words, if the record could have any effect on a determination of jurisdiction by this Court, why is it that the same record could have no effect on a determination of jurisdiction by the Fifth Circuit?

B. The Writ of Certiorari Should Be Denied Because the Commission Does Not Have Jurisdiction Over Direct Industrial Sales of Interstate Pipelines

Even if there were no procedural infirmities in the Commission's seeking a writ of certiorari prior to judgment by the Court of Appeals, the writ should not be granted because of its lack of merit.

Direct sales for consumptive use are not subject to the jurisdiction of the Commission and the Commission does not have the power to permit tariff changes by natural gas pipelines in order to authorize them to curtail deliveries to direct customers. Interpretation of the provisions of direct sales contracts dealing with curtailments is a matter for the courts of competent jurisdiction, not the Commission.

The Commission's natural gas jurisdiction is governed by Section 1(b) of the Natural Gas Act which reads:

> The provisions of this Act shall apply to the transportation of natural gas in interstate com-

> merce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but *shall not apply to any other transportation or sale* of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. (Emphasis supplied).

By this language Congress specifically excluded from Commission jurisdiction sales other than sales for resale.

Thus, the Fifth Circuit's decision in the judgment case was based upon the plain language of the Act. In dismissing the argument that it should disregard this plain meaning because of "changed circumstances of a new era," the court stated it was the role of Congress not a court to rewrite the law (Petition App. A, p. 13a):

> In speaking to the effect of new experiences under this very Act and to the identical problem we face, the Supreme Court plainly specified that Congress was the institution vested with the power to adjust the law to correct deficiencies which were not originally anticipated. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 522, 68 S. Ct. 190, 19 L. Ed. 128 (1947).

The rationale of the Fifth Circuit's opinion is that the Commission has no *continuing* certificate jurisdiction over direct sales made by interstate pipeline companies. When a certificate to make such a sale is sought by the pipeline, the Commission may issue or

veto it. Further, its permission must be obtained to abandon the use of the certificated facilities "but between the two functions the express exemption of regulatory power over such consumptive sales bars agency intervention." (Petition App. A, p. 22a). The court explained the legal basis for its holding (18a-19a):

> Not only do we fail to find any precedent for establishing a new type of FPC authority in between its §7(c) veto power over the initial authorization to begin the use of a facility to transport natural gas in interstate commerce and §7(b)'s requirement that FPC authorization be obtained for abandonment of such facilities, we find clear authority that no such continuing control over non-jurisdictional sales exists. The rationale of our own decision in *Hunt Oil Company* v. *Federal Power Commission*, 334 F. 2d 474 (5th Cir. 1964), indicates that a certificate has a permanency that is free from continuous FPC adjustment and control. (Footnotes omitted).

The basis for the Fifth Circuit's holding goes back many years and finds support in numerous cases. The Act's limitation of Commission jurisdiction, as set forth in Section 1(b), was explained in the landmark Supreme Court case of *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, at 516-517 (1947):

> This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.

> The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply *to any other * * * sale * * *.*" (Emphasis added). Those words plainly mean that the Act shall not apply to any sales other than sales "for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." Direct sales for consumptive use of whatever sort were excluded.
>
> The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed. (Footnote omitted)

The Supreme Court's holding in *Panhandle* in 1947 is as apt today as it was then, and it has since been reaffirmed by the courts and the Commission: *City of Hastings* v. *FPC*, 221 F. 2d 31 (D. C. Cir. 1954), *cert. denied*, 349 U.S. 920 (1955); *Colorado Interstate Gas Co.* v. *FPC*, 185 F. 2d 357 (3d Cir. 1950); *Coastal Transmission Corporation, et al.*, 26 F.P.C. 318 (1961). Clearly, Section 1(b) must be controlling in this proceeding and the Commission lacks jurisdiction to determine United's curtailment policies for direct customers.

Opinion No. 606 based the Commission's jurisdiction on its authority to regulate the *transportation* of natural gas in interstate commerce under Section 1(b).

and under Section 7(c) of the Act,* a certificate section. This argument is not supported by judicial precedent and is inconsistent with the Commission's own actions in unsuccessfully attempting to obtain from Congress jurisdiction over direct industrial sales.

It is recognized that the certification of the facilities constructed to make a nonjurisdictional direct sale must be obtained under Section 7(c). However, Section 7(c) is a *facilities* section of the Act and the facilities involved in the transaction are the facilities of the natural gas pipeline. It is not the sale to a direct customer that is being certificated but changes in or additions to the facilities, or the operation of facilities, of the interstate pipeline.

Obviously, in determining whether or not it will issue a certificate to a pipeline the Commission must consider its effect on the public convenience and necessity under its Section 1 "transportation" authority. *FPC* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1960). However, the Commission's authority to issue an initial certificate over pipeline facilities does not bestow upon it the right to regulate a direct sale. *A fortiori*, it does not give it continuing authority over such a sale.

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* The pertinent part reads as follows:

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . .

In *Granite City Steel Company* v. *FPC*, 320 F. 2d 711 (D. C. Cir. 1963), a case analogous to the present situation (except that it was a Section 7(a) certificate case rather than a curtailment case), a group of resale customers of Mississippi River Fuel Corporation, a natural gas pipeline, sought to have the pipeline's direct industrial customers curtailed and the gas reallocated to them. The court, reversing the Commission, found that the Commission lacked the authority to so reallocate.

In *Colorado Interstate Gas Co.* v. *FPC*, 185 F.2d 357, at 359, 360 (3d Cir. 1950) the court reversed an order by a divided Commission requiring a pipeline to file a "tariff applicable to all natural gas delivered to a buyer, whether or not for resale." The Commission was attempting continuing jurisdiction over a direct sale by means of tariff provisions. The court would not permit it:

> [T]he power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress has conferred upon the Commission that body is without authority to compel Colorado Interstate to make its gas tariff applicable to any sales other than those for resale. It is beyond the power of the Commission to require a natural gas company within its jurisdiction to make its tariff applicable to sales which are not within the regulatory power of the Commission for this would be in effect to regulate such sales. Indeed, the Commission itself recognized this in 1945 when in accepting Colorado Interstate's earlier tariff changes for filing it specified that they were to be effective only for sales "for resale for ultimate public consumption."

Two other cases in which the courts have indicated the lack of post certicate jurisdiction over direct sales by the Commission are *Panhandle Eastern Pipe Line Company* v. *Michigan Public Service Commission*, 341 U.S. 329 (1951) and *City of Hastings* v. *FPC*, 221 F. 2d 31 (D. C. Cir. 1954).

As early as 1963, the Commission, recognizing that it did not have jurisdiction to regulate the rates and terms of direct industrial sales, requested such authorization from Congress:

> At the time the Natural Gas Act was adopted in 1938, it was not believed that Commission *regulation of the rates and terms* of such sales was necessary to protect the purchasers from discrimination or unduly high rates, *or that such sales could have any adverse effect upon jurisdictional sales for resale.* Both of these views have proven to be incorrect in a significant number of situations. Thus, while the Commission is not suggesting that this type of sale is inherently improper or should be generally prohibited—on the contrary, in many situations they have been shown to be mutually beneficial to all interested parties—it is believed that *bringing such sales within the range of Commission regulations would materially enhance the effectiveness of Commission regulation of natural gas in the public interest.* (1963 FPC Annual Report, pp. 4-5). (Emphasis supplied).

The requested legislation never has been granted and the Commission lacks jurisdiction today to regulate "rates and terms" of direct sales even when lack of such jurisdiction could have "adverse effect upon jurisdictional sales for resale." In a letter dated June 12, 1963, from then FPC Chairman Joseph C. Swidler to President of the Senate, Lyndon B. Johnson, trans-

mitting the proposed legislation, he stated (June 19, 1963, *Congressional Record,* p. 11084):

> Under existing law the Commission's authority is limited to sales for resale in interstate commerce; hence, *the price and other terms of a direct sale* by a pipeline to an industrial consumer are outside the sphere of this Commission's regulatory authority. (Emphasis supplied)

The curtailment provisions clearly are "other terms of a direct sale" and as Chairman Swidler correctly observed, "outside the sphere of this Commission's regulatory authority."

From the foregoing it is clear that the Petition contains a number of fatal defects. It is premature, it is an attempt by the Commission to appeal its own Opinion No. 606 and even on the merits the Commission's position on jurisdiction is an erroneous one.

CONCLUSION

WHEREFORE, Mississippi Power & Light Company prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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February, 1972.

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SUPREME COURT, U.S.

Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION,
Petitioner,
v.
LOUISIANA POWER & LIGHT COMPANY,
(The Injunction Proceeding)
Respondent.

FEDERAL POWER COMMISSION,
Petitioner,
v.
LOUISIANA POWER & LIGHT COMPANY, *et al.*,
(The Curtailment Proceeding)
Respondents.

UNITED GAS PIPE LINE COMPANY AND
PENNZOIL UNITED, INC.,
Petitioner,
v.
LOUISIANA POWER & LIGHT COMPANY,
Respondent.

UNITED GAS PIPE LINE COMPANY,
Petitioners,
v.
LOUISIANA POWER & LIGHT COMPANY, *et al.*,
(FPC Opinion 606)
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in the injunction proceeding is not yet reported. The opinion of the District Court in that proceeding is reported at 332 F. Supp. 692. The opinions and

orders of the FPC in the curtailment proceeding (Opinion Nos. 606 and 606-A) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1972. The order of the FPC denying rehearing was issued on December 3, 1971. The jurisdiction of this Court is invoked under 28 U.S. 1254 (1) and 15 U.S.C. Sec. 717r(b).

QUESTIONS PRESENTED

1. Whether this Court may and should review, before judgment by a court of appeals, a declaratory opinion of the FPC that it has plenary authority under the Natural Gas Act to allocate the interstate gas supplies of an interstate pipeline on the basis of ultimate end-use where the agency is acting in an administrative or legislative, rather than quasi-judicial capacity, and the agency seeks an advisory opinion on an abstract question of law.

2. Whether this Court should review the judgment of a Court of Appeals, not yet final, in a private suit by an industrial consumer against its pipeline company supplier for breach of two direct sales contracts where:

   (a) One contract is fulfilled by furnishing gas from an interstate pipeline certificated by the FPC, and

   (b) The other contract is fulfilled by furnishing gas produced, transported, delivered and consumed wholly within Louisiana from a separate intrastate pipeline regulated by the Louisiana Public Service Commission, which continues to exercise its preexisting jurisdiction, although an application for a certificate has been filed with the FPC by the pipeline company.

STATUTES INVOLVED

Sections 1, 4, 5, 7 and 16 of the Natural Gas Act, 15 U.S.C. 717, 717c, 717d, 717f, 717o and 717r(b), are set forth in Petitioners' appendices.

STATEMENT OF THE CASE

State of Louisiana, Louisiana Municipal Association and the Parish of Cameron (hereinafter "The State") oppose the granting of the writs of certiorari sought by petitioners.

The injunction and curtailment cases raise the issue of whether the FPC has statutory authority to control the ultimate end-use of gas, purchased by industrial consumers or delivered by distributors not subject to federal regulation, by allocating specific gas volumes to the resale and direct sale customers of an interstate pipeline in a manner inconsistent with the pipeline's certificate and contract obligations. The State denies that the Commission may make or approve such allocations even with respect to resale customers.

Assuming that the FPC has such statutory authority, the curtailment case presents the further issue of whether a pipeline's implementation of such an agency approved allocation ousts the courts of their constitutional and statutory jurisdiction to adjudicate cases or controversies between private parties and affords the pipeline an absolute defense to any federal or state suits for injunctive relief, specific performance or damages.

The State, an intervenor and five parties to the curtailment proceeding, have filed timely petitions for review in the Court of Appeals.[1] The State has raised certain issues not raised by any of the other parties in that proceeding. These are, among others:

1. Whether the FPC's election to deal with a national gas shortage on a pipeline-to-pipeline

[1] On February 16, 1972, the Court of Appeals granted the State's motion to intervene and consolidated all six review proceedings.

basis which excludes all consideration of equities between gas producing and gas consuming States, rather than upon a nationwide basis reflecting such consideration, is an abuse of its administrative discretion.

2. Whether the FPC's refusal to conduct a nationwide allocation proceeding for the purpose of allocating all available interstate gas supplies between States, leaving to each State the responsibility for controlling the end-use of gas by its citizens, is unlawful, unduly prejudicial and creates an unreasonable difference in service between localities.

The issues in the injunction proceeding cannot be resolved without determining whether United's deliveries to LPL's Nine-Mile Point Generating Station are intrastate in nature and thus beyond the statutory jurisdiction of the FPC, under the Natural Gas Act.

Curtailment Proceeding

This proceeding was commenced by United's filing with the FPC, on October 26, 1970, a petition for a declaratory order adjudicating whether the curtailment program it made effective with Commission approval, on November 1, 1970, was consistent with the provisions of Section 12 of the General Terms and Conditions of its FPC Gas Tariff and in accordance with its direct sales contracts.[2] On December 10, 1970, the Commission scheduled hearings to begin eleven days later, on December 21, 1970. Expedited hearings were concluded on July 27, 1971 and all briefs were submitted on September 20, 1971. On August 23, 1971, the FPC granted its Staff's motion to omit an examiner's intermediate decision for the purpose of preventing delay in resolving the important questions presented.

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[2] United twice revised its tariffs, on March 10, 1971 and May 17, 1971 to conform then to its interpretation of the original Section 12.

On October 5, 1971, despite the fact that the case was ripe for a decision on the merits, the FPC in Opinion 606 neither prescribed nor approved any specific curtailment plan. Nor did it adjudicate in a declaratory order pursuant to United's original and supplemental[3] petitions the important legal issues thereby raised. Instead, without any explanation, the FPC in Opinion 606-A abandoned its announced plan to render an expedited decision and on December 3, 1971 remanded all issues to its Examiner for initial decision.[4]

Opinion No. 606 contains no ordering clauses relating to the fundamental issue of statutory authority sought to be reviewed in the curtailment proceeding. However, the FPC made a formal declaratory finding (Sol. Gen. App. E, 74a) that:

> (2) Plenary jurisdiction resides within this Commission to accept, modify, and/or approve the curtailment plans proposed by United Gas Pipe Line Company or any other jurisdictional pipeline company relating to gas transported both to resale and direct sale customers.

The FPC also made an informal declaratory finding, in the body of its opinion, that implementation of any curtailment plan by a pipeline pursuant to its procedures ". . . would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these [direct sale] contracts affected by curtailments that may be initiated in the courts." This statement was made in rejecting as unnecessary substitute fuel clauses proposed by United although the original clauses called for monetary compensation rather than specific performance. Commissioner Carver characterized this informal finding as ". . . a self-serving dictum not binding on anyone, least of all the courts who must ultimately rule upon the effect of

[3]Filed on February 22, 1971.

[4]It did decide three narrow and separable issues of minor importance.

our orders"; he noted that these contracts neither required nor received FPC approval and expressed the view that this FPC action did not reflect a proper sense of comity in judicial-administrative relations (App. E, 84a).

Injunction Proceeding

On March 31, 1971, Louisiana Power & Light Company (LPL) brought suit in the District Court to enjoin the enforcement of United's curtailment plan which was alleged to conflict with service priority rights expressly granted LPL in its direct sale contract with United. On April 28, 1971, the FPC intervened and filed a motion to dismiss for lack of subject matter jurisdiction. On April 29, 1971, United also filed such a motion.

On April 29, 1971, the District Judge granted these motions and dismissed LPL's complaint. On May 5, 1971, a Fifth Circuit panel of Judges Wisdom, Coleman and Simpson heard counsel for the FPC, United and LPL, and remanded the case to the District Court with directions to ". . . hold a full hearing at which the parties may present evidence bearing upon the jurisdiction issue." (Sol. Gen. App. D, 46a.) The order entered directed an expedited hearing on the issue of ". . . the jurisdiction of the court and on other appropriate preliminary questions." (Id., App. D, 46a.)

The District Judge conducted an evidentiary hearing on the jurisdictional issues on May 27, 1971, and dismissed the complaint. He concluded that the fact that United's curtailment plan reduced its gas deliveries below contract entitlement volumes did not demonstrate irreparable injury; that the curtailment proceedings were within the jurisdiction of the FPC and that its expertise was necessary to dispose of the issues (Id., App. C, 38a-42a).

The Court of Appeals heard argument November 18, 1971 and issued its opinion January 14, 1972, reversing the District Court and remanding for full hearing on the merits

(Id., App. A, 27a and App. B, 29a). It held that the lower court erred in finding a failure of proof on the irreparable injury issue because LPL did not have that burden at that state of the proceeding and because the record did not demonstrate such injury was not likely to occur (Id., App. A, 12a). The Fifth Circuit decided, as a matter of statutory construction, that the FPC had no jurisdiction over direct sales for gas allocation purposes and, upon the basis of the undisputed facts established at the evidentiary hearing before the District Court,[5] that the Green System serving LPL's Nine-Mile Point Generating Station was intrastate in nature and thus beyond the certificate jurisdiction of the FPC.

The Court of Appeals rejected the claims of United and the FPC that the pendency of both the certificate and curtailment proceedings before that agency barred court relief. It applied the same three-part test (See 3 K. Davis, Administrative Law Treatise, Secs. 20.01 through 20.03) as the District Court. However, it corrected the erroneous conclusions of the lower court as to potential injury and the weight to be given pending administrative proceedings where proposed agency action clearly exceeded the agency's statutory authority. The Court of Appeals also rejected United's claim that the issuance of Opinion No. 606 mooted the injunction proceeding since that agency action was itself subject to review. The Court of Appeals judicially noticed the FPC's determination in Opinion No. 606 that it needed continuing jurisdiction over gas sold under certificated direct sale contracts in order to accord full protection to the public since state commissions could not formulate a uniformly fair plan for the allocation of gas during periods of shortage (Id. App. A, 7a). But, while accepting the validity of this premise for the purposes of its decision, the court expressly refrained from any ruling upon the merits of Opinion No. 606 (Id., App. A, 27a).

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[5] Id., App. A, 22a.

REASONS WHY WRITS SHOULD NOT BE GRANTED

Curtailment Proceeding

1. Petitioners have represented to this Court that unless the FPC has statutory authority to allocate gas volumes to direct sales customers, without regard to the applicable curtailment provisions in the contracts between United and its power plant and industrial customers, essential gas deliveries to domestic users, schools, hospitals and other vital public institutions might be jeopardized. The FPC utterly failed in its Opinion No. 606 to make any findings of fact, supported by record evidence, that the dangers it perceived and the uncontrolled disruption in the determination of service priorities it feared would actually occur. The State's petition for rehearing attacked this deficiency but the FPC did not cure it in Opinion No. 606-A. Petitioners now belatedly attempt to remedy this defect by invoking, on a selective and wholly unfair basis, certain facts in the raw evidentiary record. This Court should not be called upon to make the factual determinations which the agency deliberately omitted.

2. Petitioners have neglected to advise this Court of vital facts which demonstrate the alleged national emergency to be an imaginary spectre. United's direct sales contracts all contain an Impariment of Deliveries Provision[6]

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[6] "IMPAIRMENT OF DELIVERIES

Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers." (In the industrial contracts there appear the words "including buyer" at the end of the paragraph.) (Exhibit 59, Curtailment Proceeding.)

which, without regard to how it may be construed, clearly does not entitle each of such customers to full contract volume deliveries on each and every day of the year whether or not there is enough gas to meet both their needs and those of domestic and institutional consumers. Nor have they mentioned the substantial differential which exists between the *average daily* deliveries and the *maximum peak day* deliveries respectively needed for ultimate domestic and institutional use. *United's curtailment plan subordinates its direct sale customers to such peak day needs of domestic, and commercial, end-users on each and every day of the year.*[7] The FPC has not made any finding that this is consistent with the terms of their contracts, and the State views it as both illegal and extremely inequitable.

3. Petitioners also seek to create the impression that all direct sales contracts concerning gas for use in electric generating plants and in industrial plants are *firm*, rather than *interruptible*. By definition, the latter class of customers are subordinate in service priorities to gas purchased for domestic and commercial use which is always on a firm basis. In fact, a maximum of 37% of all direct-sales gas used for such purposes in the United States is sold on a firm basis by interstate pipelines[8] (App. A, infra).

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[7] Section 12.1, Proration of Impaired Deliveries, of United's FPC Gas Tariff establishes a four priority category scheme for curtailment purposes, based respectively, on end use for domestic, process gas, electric generation to serve domestic users and industrial purposes. United's curtailment plan which is not part of its filed tariffs establishes base requirements for each pipeline, resale and direct sale customer, which reflect historic usage in a test year. These base requirements are subject to curtailment to the degree that the gas purchased by each customer is utilized for industrial or other lower priority purposes. The determination of such inferior uses is made on the arbitrary and unrealistic method of looking only to peak day end use.

[8] The statewide data from which this figure is derived includes interstate, intrastate and unregulated industrial pipelines. The percentage of firm gas sold by the latter two classes is generally substantially greater than the comparable percentage for interstate pipelines. While data was solicited from all intrastate and industrial pipelines some may not have responded.

United is an atypical pipeline, not representative of the national picture since it has a far higher percentage of industrial sales than any other major pipeline and has historically sold only firm gas. The FPC could inform this Court, by inspection and analysis of the direct sale contracts in its official files[9] of the actual percentage of firm gas[9a] and of the varying classes of self-enforcing curtailment provisions in all such contracts of interstate pipelines. Absent such data, its claim of a dire national emergency lacks credibility.

4. Petitioners would have this Court believe that unless the FPC has jurisdiction to curtail direct sales customers and to nullify both their certificate and contract rights state and federal courts will, by granting equitable relief in the form of an injunction or specific performance, compel interstate pipelines to deliver on every day of the year full contract volumes to such customers and thereby prevent deliveries of essential requirements to domestic and institutional consumers. It is axiomatic that equitable re-

[9] Such contracts are filed pursuant to the requirements of Section 155.1 of the Regulations under the Natural Gas Act. *Of the seven major interstate pipelines now in curtailment, United alone has firm direct mainline sales exceeding 1% of total annual sales.*

[9a]

Pipeline Company	*Number of Firm Direct Mainline Customers*	*Firm Direct Mainline Sales as Percentage of Total Annual Sales*
Arkansas Louisiana Gas Co.	0	0
Natural Gas Pipeline Company	2	0.898%
Panhandle Eastern Pipe Line Co.	0	0
Texas Eastern Transmission Corp.	0	0
Transcontinental Gas Pipe Line Corp.	1	0.290%
Trunkline Gas Company	1	0.605%

Source: FPC Form No. 2 for year 1970, Gas Operating Revenues, Customers and Sales.

lief is granted only by an exercise of sound judicial discretion which cannot be presumed to result in action clearly adverse to the public interest. Courts of equity would strike a proper balance between the contract rights of direct industrial customers and the consequences to the public welfare of granting such requests (*Eccles v. Peoples Bank*, 333 U. S. 426, 432).

5. United contends that the issue of the FPC's power to curtail direct industrial customers is of critical importance to the regulated interstate pipelines and to their resale and direct sale customers. This interest concerns only the possibility that pipelines will be exposed to suits for money damages which is not of such imperative public importance as to satisfy the standards of Rule 20, of this Court, as to the showing which must be made to justify bypassing the Court of Appeals. Many other questions of equal concern to all segments of the natural gas industry, such as the power of the FPC to regulate independent producers,[10] and the transition from individual to area rates for such natural gas companies,[11] have been dealt with by normal appellate processes.

6. The FPC errs in representing that this Court's power to issue a writ of certiorari before judgment in cases coming directly to the Courts of Appeals from administrative agencies has never been definitively determined (Sol. Gen. Pet., 21). Congress lacks constitutional power to invest this Court with jurisdiction to act before judgment where the original determination is that of an administrative agency acting in an administrative or legislative capacity (*Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 275; *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 467; *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442-444; Cf. *Wheeler Lumber Bridge & Supply Co. v. United States*, 281

[10] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 675.

[11] *Permian Basin Area Rate Proceedings*, 390 U.S. 747.

U.S. 572, 577; *Baltimore & Ohio Railway Co. v. I.C.C.*, 215 U.S. 216, 221-223; *United States v. Rice*, 327 U.S. 745, 747).[12] In such situations, action by this Court without an intermediate judicial review would constitute the exercise of original rather than appellate jurisdiction in circumstances outside the scope of Article III, Section 2 of the Constitution. The FPC neither determined the lawfulness of the specific gas allocation plan proposed by United nor prescribed its own plan. Such substantive determinations were deferred pending the outcome of the remanded proceedings. All the agency did was render a legal interpretation of the scope of its powers under the Natural Gas Act to approve or modify curtailment plans initiated by individual pipelines. This is essentially *administrative* action. At most, it could be deemed the making of a rule for the future which is *legislative* in character (*Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225-226).[13]

7. The declaratory opinion of the FPC in the curtailment proceedings does not finally dispose, in whole or in part of any case or controversy, does not definitively determine the status or rights of the parties to FPC Docket No. 71-29, et al., and does not order or prohibit any action relating to.

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[12] These cases which deal with statutory certification of questions by federal courts are distinguishable, but nevertheless consistent with the squarely applicable precedents.

[13] The FPC suggests that judicial review of Opinion Nos. 606 and 606-A would be appellate in nature since its determination was based on an evidentiary record (Sol. Gen. Pet., 22). But, the FPC made a pure legal determination on the question sought to be reviewed before this Court which was not based on any findings of fact, as even a cursory reading of its opinions will disclose. Moreover, the substance of an agency determination, rather than its form, is controlling. An agency which promulgates a substantive rule in an adjudicatory proceeding but does not apply it to the parties thereto is exercising "its quasi-legislative power" (*NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-766, *Accord:* dissent of Justice Douglas at 777 and dissent of Justice Harlan at 780).

the Commission's claimed statutory power to curtail direct sale customers.[14]

Thus, Petitioners are seeking an advisory opinion from this Court on an abstract question of law which is beyond the scope of its judicial power under Article III of the Constitution (*Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74; *New Jersey v. Sargent*, 269 U.S. 328, 330; *Fairchild v. Hughes*, 258 U.S. 126, 129; *Massachusetts v. Mellon*, 262 U.S. 447, 488; *Texas v. Interstate Commerce Commission*, 258 U.S. 158, 162; Cf. *National Labor Relations Board v. White Swan Co.*, 313 U.S. 23, 26-27.

8. United contends (Pet. 10) that the Louisiana Public Service Commission is constitutionally prohibited from regulating curtailment practices of intrastate gas pipelines. Its interpretation of Article VI, Section 4, of the Louisiana Constitution is incorrect since the same constitutional provision also provides that the ". . . power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered . . ." by such companies. This is an unusually broad delegation of power not found in the conventional state or federal public utility statute. Further, in a Special Order issued September 28, 1971 and in a General Order issued September 30, 1971, the Commission declared that it "has been vested with the authority and responsibility to regulate and control utilities with respect . . . to the *services* rendered by public utilities" and exercised such powers with respect to both United and other intrastate pipelines by instituting a comprehensive investigation. The FPC has conceded that its "jurisdiction was not

[14] United's curtailment plan had been made effective as to both resale and direct sale customers by unrelated orders permitting it to become effective issued on May 18, 1971 and May 28, 1971 which are not encompassed by the pending petitions for review in the Court of Appeals. United's erroneous claim (Pet. 8) of direct conflict between the Fifth Circuit decision and that of a district court in another Circuit is based on review of these orders for interim enforcement of the curtailment plan.

intended to vary from state to state depending upon the degree of state regulation." (*The Secretary of the Army, Atlantic Seaboard Corporation*, Order Denying Rehearing, Dkt. No. CP66-179, issued October 22, 1971).

Petitioners claim that this Court should construe the Act broadly in favor of federal regulation of end use of natural gas because state commissions cannot adequately deal with this problem. But, as the FPC itself recognized in Opinion No. 606-A: "*Our jurisdiction over the disposition of natural gas ends when it reaches the hands of a nonjurisdictional person such as a distributor purchasing for resale.* This language would in effect attempt to extend our jurisdiction over the disposition of gas by a local distributor, a matter within the province of the local regulatory body." (Sol. Gen. App. F, 71a.)

Injunction Proceeding

9. Petitioners seek review of a judgment of the Court of Appeals which has remanded the case to the District Court for findings on the issue of irreparable injury. Thus, no final order or decree has been entered and the case is not yet ripe for review by this Court (*Germann v. United States*, 389 U.S. 328; *Hamilton Shoe Co v. Wolf Brothers*, 240 U.S. 251, 257-258).

10. Petitioners seek review of the curtailment issue in the context of the injunction proceeding for the purpose of obtaining a broad advisory opinion which will have far-reaching consequences beyond the scope of this narrow private litigation. Only one of United's forty-six industrial and power plant direct sale customers is a party to this suit. Further, the curtailment proceeding presents a comprehensive and interrelated set of issues which must be considered together to fully and fairly resolve the matters presented for decision on statutory review of Opinion No. 606 (see, supra, pp. 14). By way of contrast, the injunction proceeding presents for decision only an isolated and fragmented

portion of the whole complex of problems posed by the FPC's effort to obtain an advisory opinion that it has plenary jurisdiction over pipeline curtailment plans. This court has applied a maximum of caution in granting requests for advisory rulings whose implications cannot be foreseen (*Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237, 242-244). The State respectfully submits that such caution is essential here because some of the drastic and far-reaching consequences of the legal blank check sought by this agency are already evident. Pipelines will be permitted to curtail customers before they even experience a gas supply shortage if they elect to fail to provide additional transmission capacity needed to serve their resale and direct customers because of the additional risk involved in making such investments during a period of potential future gas shortages.[15] The FPC has also indicated that both resale and direct sale certificates must be continuously reevaluated to make all direct and resale pipeline rates and charges "fully compensatory" and thus provide financial incentive to encourage exploration for and development of new gas reserves (Sol. Gen., App. A, 7a, App. E, 64a). The State submits that gas allocation proceedings are not the proper vehicle for dealing with this problem.

11. Petitioners seek review by this Court of the question of whether the Fifth Circuit abused its judicial discretion in determining the merits of the issue of whether United's separate intrastate pipeline facilities used to serve LPL's Nine-Mile Point Generating Station are intrastate in nature and beyond the statutory jurisdiction of the FPC. Significantly, they do not make any attack upon the legal test applied by the Court of Appeals or upon the soundness of its application of the controlling legal principles to the

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[15] Order Suspending Proposed Tariff Sheets, etc., p. 4 issued August 5, 1971, 1971 in *El Paso Natural Gas Company*, Docket RP72-6. Sec: 11.3 Curtailment Procedures, El Paso Natural Gas Co., FPC Gas Tariff, issued July 2, 1971.

undisputed facts of record. Instead, they invoke the doctrine that a federal court should not enjoin the conduct of administrative proceedings merely because one of the private parties challenges the agency's jurisdiction.[16] No such interference was attempted in the injunction proceeding which is a private law suit and the FPC was neither a defendant nor obliged to intervene.

United also cites *Marine Engineers v. Interlake Co.*, 370 U.S. 173, which is completely distinguishable since it concerned the administration of the federal labor statutes which this Court has held involve a congressional delegation to that agency of power to determine the metes and bounds of its own domain. No such broad preemption rule can be applied in determining whether the Louisiana Public Service Commission which has always regulated United's separate intrastate pipeline systems has lost jurisdiction to the FPC because of the unilateral action of that company in filing an application for a federal certificate. These considerations make this a particularly appropriate case for the application of the rule that exhaustion of administrative remedies is unnecessary where the agency is clearly acting in excess of its statutory authority. *Leedom v. Kyne*, 358 U.S. 184, *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 562; *Deering Milliken, Inc. v. Johnson*, 295 F.2d 856 (C.A. 4).

12. Petitioners position here is inconsistent with the views they earlier urged upon both the District Court and the Court of Appeals where they denied the jurisdiction of the court to decide either the certificate or the curtailment issue because agency proceedings were pending. Petitioners claim (Sol. Gen. Pet. 20; United Pet. 14, ftn. 26) that the discretionary prior exhaustion of remedies issue is now moot as to the curtailment issue because the FPC issued its Opinion 606 and 606-A prior to the Court of Appeals decision. This argument proves too much, since the FPC, on February

[16] *Myers v. Bethelem Shipbuilding Corp.*, 303 U.S. 41 and *Federal Power Commission v. Arkansas Power & Light Co.*, 303 U.S. 802, rev'g mem. 156 F.2d 821 (C.A. D.C.)

9, 1972, issued its Opinion No. 610 in the certificate proceeding thereby under their view also mooting the certificate issue which they urge this Court to review. Aware of this dilemma, United suggests that the certificate issue will not be ripe for review by any court until the FPC exhausts its administrative rehearing procedures. This is wholly untenable since, as the Court of Appeals noted (Sol. Gen. App. 27a, ftn. 18) it is the pendency rather than the conclusion of agency proceedings which may, under certain circumstances, require a court to refrain from exercising its judicial powers until the agency has finally acted. Petitioners' equally futile and unsound effort to distinguish the curtailment and certificate issues on the ground that the Fifth Circuit has squarely rejected the legal rationale of the FPC's curtailment decision runs afoul of the hard fact that that court also squarely rejected the legal rationale underlying the FPC's recent certificate decision.

CONCLUSION

For the reasons stated,[17] the State strongly opposes the granting of the petitions for writs of certiorari, and urges that they be promptly denied.

Respectfully submitted,

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February, 1972.

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[17]We note further that the decision below is clearly consistent with the principles underlying the controlling precedence in this Court, *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, and *Federal Power Commission v. Transcontinental Gas Corp.*, 365 U.S. 1.

APPENDIX A

GAS REQUIREMENTS

FIRM INDUSTRIAL AND FIRM GENERATION

PERCENT FIRM OF TOTAL

(MILLION CUBIC FEET)

	FIRM		TOTAL FIRM INDUSTRIAL AND GENERATION	TOTAL ALL USES	PERCENT FIRM INDUSTRIAL AND GENERATION OF TOTAL
	INDUSTRIAL	GENERATION			
LOUISIANA	1,181,538	315,274	1,496,812	1,790,250	84
TEXAS	1,933,846	835,163	2,769,009	4,008,246	69
ARKANSAS	189,877	94,333	284,210	418,346	68
NEVADA	12,656	21,287	33,943	54,399	62
MISSISSIPPI	129,647	83,595	213,242	371,361	57
FLORIDA	55,681	143,847	199,528	362,028	55
OKLAHOMA	56,703	224,331	281,034	540,566	52
W. VIRGINIA	80,750	45	80,795	215,504	37
INDIANA	191,067	3,299	194,366	546,422	36
OHIO	371,781	12,960	384,741	1,112,769	35
PENNSYLVANIA	292,585	683	293,268	841,296	35
ALABAMA	108,861	133	108,994	317,765	34
DELAWARE	8,162	88	8,250	27,320	30
ILLINOIS	283,860	72,341	356,201	1,216,941	29
IDAHO	11,683	-	11,683	45,320	26
TENNESSEE	72,972	-	72,972	300,787	24
MICHIGAN	170,611	27,854	198,465	877,807	23
MARYLAND	23,362	11,513	34,875	165,111	21
MAINE	394	-	394	1,906	21
VIRGINIA	28,346	-	28,346	144,013	20
CONNECTICUT	12,682	-	12,682	64,020	20
IOWA	62,359	424	62,783	378,610	17
N. CAROLINA	26,970	3	26,973	157,610	17
WYOMING	13,077	-	13,077	75,417	17
KENTUCKY	39,854	335	40,189	254,315	16
RHODE ISLAND	3,286	-	3,286	24,109	14
WASHINGTON	22,141	-	22,141	159,100	14
OREGON	13,296	-	13,296	93,715	14
WISCONSIN	38,970	3,049	42,019	328,652	13
ARIZONA	23,654	4,876	28,530	215,375	13
MINNESOTA	38,748	3,601	42,349	332,197	13
NEBRASKA	28,429	-	28,429	215,369	13
GEORGIA	44,568	-	44,568	368,446	12
NEW YORK	87,639	335	87,974	762,010	12
S. CAROLINA	18,916	-	18,916	161,523	12
KANSAS	56,934	7,319	64,253	602,834	11
NEW JERSEY	39,669	178	39,847	357,652	11
MISSOURI	37,729	5,043	42,772	439,698	10
COLORADO	17,186	5,180	22,366	254,814	9
MASSACHUSETTS	13,413	486	13,899	151,907	9

CONNECTICUT	12,682	-	12,682	64,020	20
IOWA	62,359	424	62,783	378,610	17
N. CAROLINA	26,970	3	26,973	157,610	17
WYOMING	13,077	-	13,077	75,417	17
KENTUCKY	39,854	335	40,189	254,315	16
RHODE ISLAND	3,286	-	3,286	24,109	14
WASHINGTON	22,141	-	22,141	159,100	14
OREGON	13,296	-	13,296	93,715	14
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MISSOURI	37,729	5,043	42,772	439,698	10
COLORADO	17,186	5,180	22,366	254,814	9
MASSACHUSETTS	13,413	486	13,899	151,907	9
NEW MEXICO	4,717	8,322	13,039	167,263	8
MONTANA	2,590	1,234	3,824	82,468	5
CALIFORNIA	86,922	32,014	118,936	2,177,896	5
UTAH	3,618	-	3,618	122,358	3
NEW HAMPSHIRE	185	-	185	5,430	3
VERMONT	29	-	29	2,619	1
S. DAKOTA	160	-	160	31,435	1
N. DAKOTA	30	-	30	19,463	0
DIST. OF COL.	-	-	-	27,852	-
UNITED STATES**	5,942,153	1,919,145	7,861,298	21,392,314	37

Source: Future Gas Requirements of the United States.* Volume No. 4, October 1971, 'Appendix C— Calendar year 1970.' Prepared by the Future Requirements Committee under the auspices of the Gas Industry Committee, Published by the Future Requirements Agency, Denver Research Institute, University of Denver, Denver, Colorado.

*Alaska and Hawaii omitted.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent*

(The "Collateral Proceeding")

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, et al, *Respondent*

(The Curtailment Proceeding)

Brief of Respondent New Orleans Public Service Inc. in opposition to Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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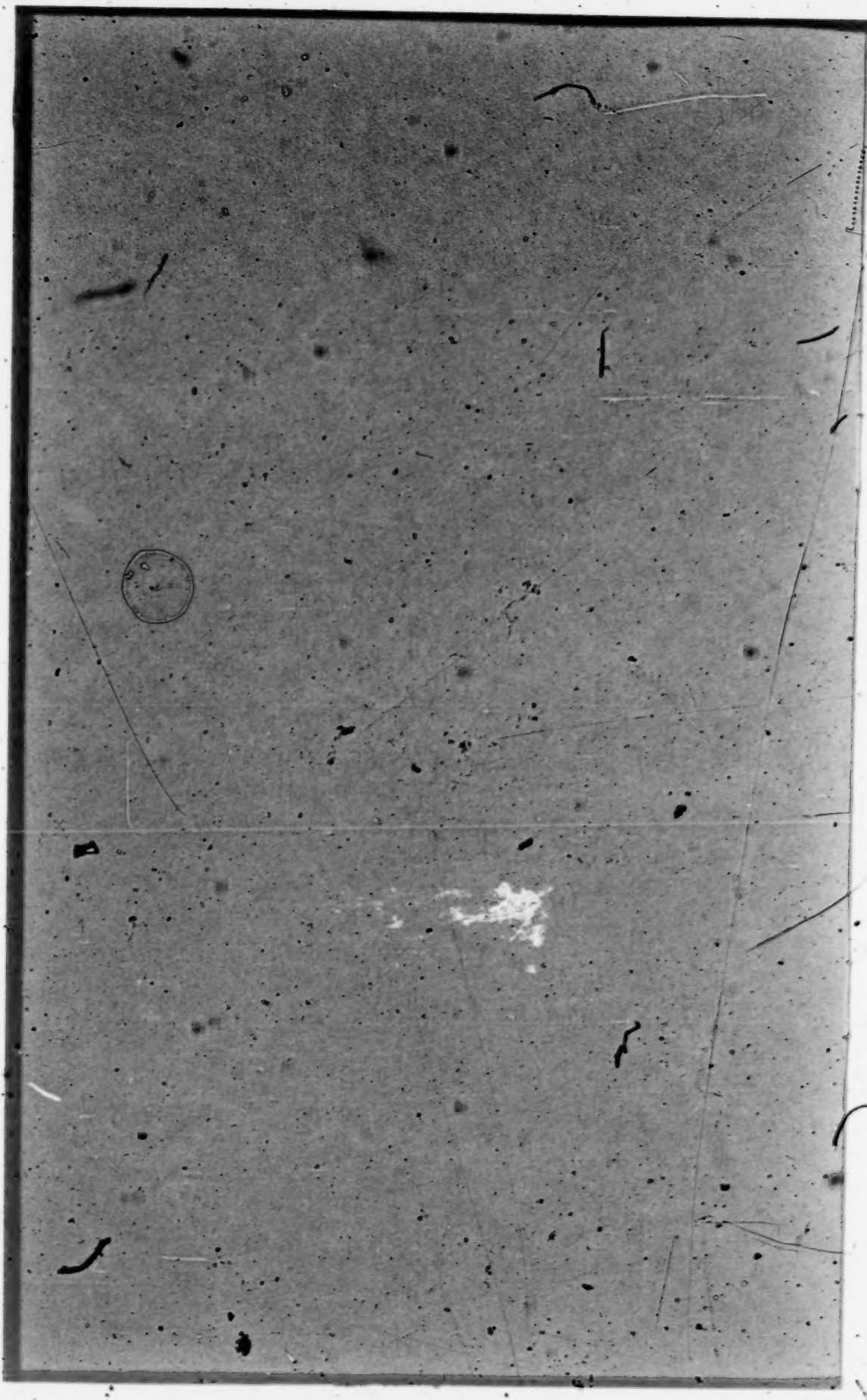

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IN THE

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Respondent New Orleans Public Service Inc. (NOPSI) was not a party to the "Collateral Proceeding". NOPSI was a party to the curtailment proceeding before the Commission and is a party to the "Curtailment Proceeding" pending in the Court of Appeals. The Commission

seeks removal of this cause from the Court of Appeals and decision by the Supreme Court without any prior judicial decision or action.

Jurisdiction

As to the "Curtailment Proceeding", jurisdiction is not conferred by 28 U.S.C. 1254(1) because the petition invokes the original jurisdiction of this Court, which is controlled by Article III, Section 2, of the Constitution.

Questions Presented

I. In the Curtailment Proceeding:

Whether this Court should remove a pending cause from the Court of Appeals and make the original judicial review of an order of the Federal Power Commission.

II. In the Injunction Suit:

Whether this Court should grant certiorari to review an interlocutory order of the Court of Appeals.

Reasons for Denying the Writs

I. In the Curtailment Proceeding:

The petition asks this Court to grant certiorari before judgment in a case which went directly from the Commission to the Court of Appeals. The first question which arises is whether this Court would be exercising original jurisdiction if it should become the first judicial tribunal to decide this case. If this is an exercise of original jurisdiction, the case clearly is outside the original jurisdiction of this Court under Article III, Section 2 of the Constitution.

Petitioner cites no case (and we can find none) where this Court granted certiorari before judgment in a case which went directly from an administrative agency to a court of appeals. This Court has declined consistently to be the first judicial tribunal to decide a case where original jurisdiction is not conferred by Article III, Section 2 of the Constitution. *United States v. Rice*, 327 U.S. 742, 747-748; *Wheeler Lumber Bridge and Supply Company v. United States*, 281 U.S. 572, 576. Compare *Old Colony Trust Company v. Commissioner*, 279 U.S. 716, 728-729. See Stern and Gressman, *Supreme Court Practice*, pp. 28-30 (4th ed., 1969); Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, Section 132.

Even if this Court decides that the petition invokes appellate jurisdiction, respondent submits that certiorari should be denied under Rule 20 of the Supreme Court Rules. That rule states that certiorari before judgment will be granted "only upon a showing that the case is of such imperative public importance as to justify a deviation from normal appellate processes and to require immediate settlement in this Court".

Assuming, *arguendo*, that certiorari should be granted in the injunction case, the requirement of Rule 20 must still be satisfied with respect to the curtailment proceeding. Certiorari before judgment is sought in the curtailment proceeding solely in order to get the record in that proceeding before this Court in the injunction case. (Petition for Certiorari, pp. 12-13, 20-21.) Respondent submits that the "showing" contained in the petition falls far short of the requirement of Rule 20.

The petition suggests that the opinion of the Court of Appeals in the injunction case has created an emergency

which would justify certiorari before judgment in the curtailment proceeding. (Petition for Certiorari, pp. 14-16, 22-23.) In fact no such emergency exists. Pursuant to Commission order, United filed a curtailment program affecting all of its customers and on July 2, 1971, the Commission ordered United to carry out its filed curtailment plan pending a decision on the issues. (App. 73a, Petition for Certiorari.) This order has not been stayed nor has United been enjoined from curtailing deliveries of gas to direct customers; such deliveries are in fact being curtailed currently under plans filed by United and approved by the Commission.

NOPSI buys all of its gas supply from United, NOPSI resells gas in the City of New Orleans and also uses gas as fuel for generating electricity which it distributes in New Orleans. The NOPSI-United Contract is in the curtailment proceeding record (R-7236-7293). It provides, in the event of shortage, that United shall first supply *all* the requirements of domestic consumers of gas (which would include hospitals, schools, etc.); that United shall next supply *all* the requirements of electric power plants using gas to generate electricity for domestic consumers, and that the remaining available gas, if any, shall be prorated among other customers.[1]

1. "Buyer specifically recognizes the fact that Seller delivers gas to (a) gas utilities other than Buyer for resale to domestic and industrial consumers, (b) steam electric power plants for use in generating electricity which is sold to domestic consumers, and (c) industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its customers, including Buyer, then it is mutually agreed that the gas requirement of gas utilities (including Buyer) selling gas to domestic consumers (but only to the extent of gas required for resale to such domestic consumers) shall first be supplied by Seller. If Seller is unable to supply gas for all the requirements of such gas utilities for resale to

The record of the Commission hearings shows that all of United's direct sales contracts contain the above or similar language. Thus the direct sales contracts set up a system of priorities which renders impossible the hypothetical situation described on pp. 14-15 of the petition.

II. In the "Collateral Proceeding":

Here the petition seeks review of the judgment of the Court of Appeals. That judgment is not a final judgment; it remands the cause to the District Court for disposition on its merits. (App. B, pp. 28a-29a, Petition for Certiorari.)

In the absence of a very exceptional and compelling reason, this Court has refused consistently to grant certiorari to review a judgment remanding a case to the district court for trial. In *American Construction Company v. Jacksonville, Tampa and Key West Railway Company*, 148 U.S. 372, 384, this Court said: "'Clearly, therefore, this Court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from

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domestic consumers, then gas for such requirements shall be supplied ratably. In the event Seller is able to supply gas for all the requirements of such gas utilities for resale to domestic consumers, then there shall next be supplied the gas requirements of steam electric power plants (including plants of Buyer) using gas for the generation of electricity which is sold to domestic consumers, whether such power plants purchase their requirements from Seller or from gas utilities (including Buyer) purchasing their requirements from Seller, and, if Seller does not have sufficient gas to supply all of the requirements of said power plant (including plants of Buyer), then said requirements shall be supplied ratably. After the above gas requirements have been supplied, the remaining gas supply, if any, shall be prorated by Seller among its other customers, including Buyer, and other gas utilities to the extent of gas sold by them to their customers."

an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." See also *Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Aroostook Railroad Company*, 389 U.S. 327, 328, and *Hamilton Shoe Company v. Wolf Brothers*, 240 U.S. 251, 257-258.

Respondent submits that it is not necessary that writ of certiorari be issued to "prevent extraordinary inconvenience and embarrassment in the conduct of the cause". The cause is back in the District Court for trial on its merits. There are no injunctions or other legal restraints on further litigation of this cause by the parties, nor are there any restraints on further administrative proceedings by petitioner. As a matter of fact, the administrative process is proceeding just as it did before the opinion of the Court of Appeals issued on January 14, 1972. For example, on October 5, 1971, the Commission remanded the curtailment proceeding to the Examiner for further hearings. (App. E, p. 75a, Petition for Certiorari) On February 17, 1972, pursuant to the remand, the Examiner scheduled for June 1, 1972, a hearing on the environmental impact of United's curtailment program. (App. P, infra, pp. P-1—P-6)

The real source of all of Petitioner's complaints concerning action by the Court of Appeals is the *opinion* of that Court—not its *judgment*. Petitioner argues that the Court of Appeals erred in ruling that the Commission has no jurisdiction over the facilities known as the "Green System". (Petition for Certiorari, pp. 19-20) Petitioner's point seems to be that the Court of Appeals should have waited for the Commission to make the initial determination of this question. But the Court of Appeals did not

interfere with the administrative process in the certificate proceeding. On the contrary, the Commisison conducted a lengthy hearing which was concluded on June 18, 1971. And on February 9, 1972, the Commission issued its Opinion No. 610 in the certificate proceeding, holding, contrary to the Court of Appeals, that it has jurisdiction over the facilities in question.[2] In this opinion and order the Commission remanded the certificate proceeding to the Presiding Examiner and set the next hearing for April 25, 1972. No doubt there will be appeals from this order, but the Administrative process goes on unimpeded. Meanwhile direct customers served by the "Green System" continue to be curtailed under the curtailment program filed by United and approved by the Commission.

Conclusion

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

CLAYTON L. ORN
NELSON JONES
Counsel for Respondent
New Orleans Public Service Inc.

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Vice President and General Counsel
New Orleans Public Service Inc.

---

2. See App. F, p. 91a, Petition for Certiorari in United Gas Pipe Line Company v. Louisiana Power & Light Company, No. 71-1040.

APPENDIX P

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

United Gas Pipeline Company) Docket Nos. RP71-29,
RP71-120, RP71-99

PRESIDING EXAMINER'S ORDER REOPENING HEARING AND DIRECTING COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

(February 17, 1972)

In Opinion No. 606 issued October 5, 1971, remanding the above entitled proceeding, the Commission directed the Presiding Examiner, *inter alia*, to ". . . also include findings concerning the environmental impact of the United curtailments." While perhaps implicit therein, by virtue of Sections 2.80-2.82 of the Commission's Rules of Practice & Procedure, such direction was not contained in the initial hearing order of December 10, 1970.

At the post hearing conference thereafter convened on October 20, 1971, the Presiding Examiner directed that those parties wishing to do so file proposed findings bearing on the environmental impact of United's curtailment program supported by specific references to the record. Few of the parties chose to file such proposed findings. Such as were filed clearly demonstrated the insufficiency of the record insofar as any environmental considerations were concerned. Nevertheless, in order to avoid reopening of the record and the resultant delay, it was the Presiding Examiner's intention to write his opinion, determining

those issues for the purpose of which this proceeding was remanded, and to make such limited environmental findings as could be made on the basis of the existing record.

However, the Court's conclusion in the recent case of *Greene County Planning Board v. Federal Power Commission*, ____ F.2d 1395, (C.A. 2, Jan. 17, 1972) that "the Commission was in violation of NEPA by conducting hearings prior to the preparation by its staff of its own impact statement" (Slip Op. p. 1411), makes it clear that failure to reopen the record for that purpose and issuance of an initial opinion by the Presiding Examiner prior to preparation of a detailed environmental impact statement by the Commission staff, "subject to the full scrutiny of the hearing process", (Slip Op. p. 1412) would constitute reversible error.

Another recent case, City of New York, et al. v. The U.S.A., I.C.C. et al. ____ F. Supp. ____ (E.D. N.Y. decided Jan. 20, 1972) (three-judge court, Friendly, J.), decided almost simultaneously with the Green County case, affirms the conclusion that the instant case similarly must be reopened for compliance with NEPA. The case involves a railroad abandonment proceeding and the possible pollution of the atmosphere by reason of the replacement of trucks for the railroad. Despite the fact that the environmental issue "was first raised by the City in its Exceptions to the Examiner's report," the Court nevertheless disregarded the fact that the hearing had been concluded and remanded the case to the I.C.C. for further proceedings stating; "The tardiness of the parties in raising the issue cannot excuse compliance with NEPA; primary reponsibility under the Act rests with the agency." (Slip Opinion pg. 17) The Court's discussion of the issue

was concluded with, "Thus, this proceeding must be remanded to the Commission for it to bring itself into compliance with the law."

It is to be noted that the Court in the *Greene County* case determined that the part of the project under discussion therein, namely construction of a transmission line 35 miles long, constituted a "major federal action." (Slip Op. p. 1408) In the instant case the adverse environmental impact of United's curtailment of natural gas deliveries, and the substitution of alternate fuels for the portion curtailed, particularly power plant and industrial customers, will be manifest all along the 10,656 miles of United's pipeline system extending across the states of Texas, Louisiana, Mississippi, Alabama and Florida. Applying the logic of the former to the latter, the Presiding Examiner will have no difficulty finding that United's curtailment program, and the Commission's determination with respect to the validity thereof, constitutes a "major federal action." The direction in Opinion No. 606 to the Presiding Examiner to make environmental impact findings strongly indicates that the Commission has already reached the same conclusion. It is further to be noted that while the Court in Green County construes NEPA in relation to a hydroelectric project, Section 102(c)(2) of NEPA, and the Court, speak in terms of *all "proposals* for . . . major federal actions significantly affecting the quality of the human environment."

United filed its petition in this case on October 26, 1970. The Commission's order setting the matter for hearing was issued December 10, 1970. Commission Order No. 415 promulgating Sections 2.80 through 2.82 of the Commission's Rules of Practice and Procedure entitled

"Statement of General Policy to Implement Procedures For Compliance with the National Environmental Policy Act of 1969" was issued on December 4, 1970, and amended by Commission Orders No. 415-A issued April 13, 1971, and 415-B issued November 19, 1971. It is a matter of record that none of the parties to this proceeding have complied with the procedures outlined in Section 2.82 of the Rules, perhaps by reason of the fact that the section on its face appears to be limited to certificate applications, and the fact that they were issued only a few days before issuance of the Commission's initial hearing order in this case. However, inasmuch as the stated purpose of these regulations is to implement NEPA, which Act concerns itself with *all* major federal actions, and which, for all intents and purposes, parallels the requirements of Section 102(c)(2) of NEPA and Section 10(b) of the Guidelines of the Council on Environmental Quality, it is conclusive that such regulations must also apply to *all* major federal actions. Moreover, NEPA Section 102(1) directs that "to the fullest extent possible" regulations should be interpreted and administered in accordance with the policies of NEPA.

In the present posture of this proceeding, it does not appear that reopening of the record will result in any substantial, or in fact any, delay of final Commission determination of this proceeding in the light of the action taken, and to be taken, in connection with *Louisiana Power and Light v. United Gas Pipe Line Co., et al.*, ____F.2d____, (C.A. 5, 1972). Should some delay nevertheless result, the parties are referred to the comments of the respective Courts on the subject in the *Greene County* case, *supra,* (Slip Op. p. 1412), and in *Calvert Cliffs*

Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109, 1122.

The Court in *Greene County* admonished the "Commission to determine the most efficient procedure for meeting this mandate" (Slip Op. p. 1412). Accordingly, to achieve compliance with NEPA, the Commission's Rules of Practice and Procedure, and the requirements set out in *Greene County Planning Board v. F.P.C., supra,* it is ordered that:

1. On or before March 10, 1972, United file a detailed statement with copies to all parties, of the environmental impact of its curtailment program, developing fully the five factors listed in Section 102(2)(c) of NEPA.

2. Such statement shall then immediately be submitted by Staff for comment to the Federal agencies having "jurisdiction by law or special expertise with respect to any environmental impact involved" (NEPA, Sec. 102(2)(c).

3. Commission Staff shall serve copies of the comments of the Federal agencies referred to in paragraph 2 hereof on the parties to this proceeding immediately upon receipt thereof. Commission Staff shall also prepare its own detailed statement concerning the environmental impact of United's curtailment program on or before May 15, 1972, with copies to all parties and be prepared to produce a witness, or witnesses, to sponsor such statement and be cross-examined thereon on the date hereinafter fixed by the Presiding Examiner.

4. On or before May 15, 1972, all intervenors taking a position with respect to the environmental impact of United's curtailment program shall file with the Commission an analysis of their respective environmental positions such as that contemplated by Section 2.82(c) of the Commission's Rules of Practice and Procedure with copies to all parties and shall offer written prepared testimony in support thereof which shall be filed with the aforementioned analysis.

5. Reopening of the hearing, limited to admission of testimony relating to the environmental impact of United's curtailment program, as hereinabove described, and cross-examination thereon, is hereby scheduled for June 1, 1972. Said date shall be subject to change upon request of any of the parties for good cause shown.

MARTIN E. RENDELMAN
Martin E. Rendelman
Presiding Examiner

SUPREME COURT, U. S.

Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION,
Petitioner,
v.
LOUISIANA POWER & LIGHT COMPANY,
(The Injunction Proceeding)
Respondent.

FILED
FEB 28 1972

FEDERAL POWER COMMISSION,
Petitioner,
v.
LOUISIANA POWER & LIGHT COMPANY, *et al.*,
(The Curtailment Proceeding)
Respondents.

UNITED GAS PIPE LINE COMPANY AND
PENNZOIL UNITED, INC.,
Petitioner,
v.
LOUISIANA POWER & LIGHT COMPANY,
Respondent.

UNITED GAS PIPE LINE COMPANY,
Petitioners,
v.
LOUISIANA POWER & LIGHT COMPANY, *et al.*,
(FPC Opinion 606)
Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN THE INJUNCTION PROCEEDING

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OCTOBER TERM, 1971

No. 71-1016

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Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
(The Injunction Proceeding)
Respondent.

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*,
(The Curtailment Proceeding)
Respondents.

No. 71-1040

UNITED GAS PIPE LINE COMPANY AND
PENNZOIL UNITED, INC.,
Petitioners,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*,
(FPC Opinion 626)
Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN THE INJUNCTION PROCEEDING

State of Louisiana, Louisiana Municipal Association and Parish of Cameron, Louisiana, hereby respectfully move for leave to file the attached brief as *amici curiae* in the so-called "injunction proceeding" listed in the caption above.

State of Louisiana, Parish of Cameron, are a state and a political subdivision of a state, respectively, and hence need not obtain consent to the filing of an *amicus* brief. Louis-

ana Municipal Association is a nonprofit organization of cities and towns chartered under state law, and has obtained the consent of the attorney for Louisiana Power and Light Company. The consent of the Solicitor General, as attorney for petitioner, Federal Power Commission, and of the attorney for petitioner, United Gas Pipe Line Company has been requested, in writing, concurrently.[1]

Joint movants were intervenors in the proceeding before the Federal Power Commission entitled *United Gas Pipe Line Company*, Docket Nos. RP71-29, et al., in which the Commission issued Opinion Nos. 606 and 606-A in the so-called "curtailment proceeding" which petitioners herein seek to have reviewed by this Court. Joint movants have also filed in the United States Court of Appeals for the Fifth Circuit a petition to review Opinion Nos. 606 and 606-A, C.A. 5, No. 72-1220. Movants' participation as parties in the curtailment proceeding below, and in this Court, result from the fact that the Commission's opinions and accompanying orders in said proceeding decide certain issues respecting its statutory authority to reduce the supply of gas which United Gas Pipe Line Company is obligated to furnish its jurisdictional resale and non-jurisdictional direct sale customers, in violation of rights claimed by such customers and by movants.

The Solicitor General, in his petition for certiorari, states that at least one issue that he wishes this Court to pass upon—i.e., the Commission's jurisdiction to curtail direct sales customers of an interstate pipeline in a manner inconsistent with their contract rights—is present in both the curtailment proceeding and the case from the Fifth Circuit, which he characterizes as the "collateral proceeding." Movants believe that the Fifth Circuit case is more aptly described as an "injunction proceeding," and though they have a different view of the pertinent issues before this Court than

[1] A representative of the Solicitor General has advised that such consent will be granted and the Attorney for United has orally granted such consent.

the Solicitor General, they agree that the Fifth Circuit case and the curtailment proceeding have some related issues. Accordingly, since movants' interests will be affected by the outcome of both proceedings, and since a discussion of both proceedings is necessary in order to make a meaningful response to the petition for certiorari, movants request leave from the Court to file the attached brief as *amici curiae* in the proceeding which petitioners seek to bring before this Court on review from the Fifth Circuit.

Respectfully submitted;

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1016

FEDERAL POWER COMMISSION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION,

Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*
(The Collateral Proceeding)

Respondents.

FEDERAL POWER COMMISSION,

Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*
(The Curtailment Proceeding)

Respondents.

MEMORANDUM OF RESPONDENT INTERNATIONAL PAPER COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

On February 7, 1972, the Solicitor General, acting on behalf of the Federal Power Commission, petitioned for writs of certiorari to the United States Court of Appeals for the Fifth Circuit. The petitions seek to bring before this Court (1) the decision of the court of appeals in *Louisiana Power & Light Co., v. United Gas Pipe Line Co.* (the collateral

proceeding)[1] and (2) the Power Commission's Opinion and Order Nos. 606 and 606-A (the curtailment proceeding).[2] The latter are before the court of appeals on several petitions for review filed pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

Respondent International Paper Company (IP) is a direct sale customer of United Gas Pipe Line Company (United) and was a party to the curtailment proceeding, which involved the establishment of priorities governing deliveries of United's gas supplies, before the Commission. On December 15, 1971, IP filed with the Fifth Circuit a petition for review of the orders issued by the Commission in that proceeding. This petition, assigned Docket No. 71-3531, was, upon motion of the Commission, subsequently consolidated with five other petitions on February 16, 1972.

As delimited by IP's application for rehearing to the Commission,[3] the issues raised by its petition for review in the court of appeals do not include any question as to the Commission's jurisdiction over curtailment of gas deliveries to direct industrial customers of an interstate pipeline.[4] Instead IP has only questioned the Commission's authority to approve a proposed tariff provision relating not to deliveries of gas to direct customers but rather to the rates to be charged such customers. Such a provision was contained in § 12.3 of United's tariff filing of May 17, 1971, and would

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[1]Set out at pages 1a-27a of the Solicitor General's petitions.

[2]Set out at pages 48a-84a of the Solicitor General's petitions.

[3]Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), imposes an unusual, stringent prohibition against raising in court issues not raised in petitions to the agency for rehearing. Other parties did preserve the jurisdictional issue on petitions for rehearing and raised it in their petitions for review.

[4]This question is the principal one which the Solicitor General seeks to have determined by this Court (Petitions at 4-5). IP, of course, has no interest in the second question presented, i.e., whether the courts or the Commission should determine initially the jurisdictional status of a pipeline's facilities.

have eliminated, in times of impaired deliveries, United's obligation to IP under a so-called "substitute fuel" clause contained in IP's contracts with United. This clause provides for reimbursement of IP, under certain circumstances, for the incremental costs of substitute fuel utilized during times when United is unable to meet its delivery obligations.

In addition, IP has taken issue with (1) the Commission's ruling that operation by United of its system in accordance with a Commission-approved curtailment plan constitutes an absolute defense to any breach of contract action by direct, nonjurisdictional customers, even if based on the substitute fuel clause described above, and (2) the Commission's ruling, without a hearing on the question, that such a clause is *per se* unlawfully preferential and therefore invalid.[5]

In view of the foregoing, it is clear that the issues on which the Solicitor General's petitions seek certiorari and certiorari before judgment are not presented by IP's petition for review now pending before the Fifth Circuit. Accordingly, there is no reason for the Court to grant the petition for certiorari before judgment insofar as it encompasses IP's petition for review.

The Solicitor General appears to have recognized that the issues raised by IP in the Fifth Circuit are not encompassed by the first question presented in his petitions. At p. 21, the Solicitor General says:

> "To the extent that the petitions for review raise issues in addition to the question of the Commission's basic authority over curtailment of natural gas deliveries to direct sales customers, the cases can be remanded to the court of appeals for further proceedings after disposition of the basic issue by this Court."

[5]The portions of the Commission's opinions to which the issues raised by IP in the proceedings before the Fifth Circuit are addressed are set out at pages 68a-71a and 80a-81a of the Solicitor General's petitions.

Since IP's petition for review *in toto* raises issues other than the question of the Commission's basic jurisdiction, we respectfully suggest that the Court need not and should not grant certiorari with respect to the IP proceeding, but should rather permit IP's petition for review to remain pending before the Fifth Circuit for whatever proceedings that court believes appropriate in light of the action of this Court. The Solicitor General's petitions are filed under 28 U.S.C. § 1254(1), which provides for review by this Court of "cases in the courts of appeals" and specifically for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." The "cases" in the court of appeals are the several petitions for review. There is no point bringing here IP's "case," which does not even pose the issue the Solicitor General wants this Court to decide.

Yet another reason for denial of certiorari before judgment with respect to IP's petition for review is that, while the threshold question of the Commission's jurisdiction has been determined adversely to the Commission by the Fifth Circuit in the collateral proceeding, this is not the case with respect to the issues raised by IP. Those issues were not before the Fifth Circuit in the collateral proceeding. They were raised only in the context of the curtailment proceeding. Consequently, the current decisional status of these issues cannot give rise to any claim of uncertainty as to the Commission's basic authority to administer curtailments of natural gas, the claim associated with the Fifth Circuit's decision in the collateral proceeding. Thus no pressing need exists, in terms of the orderly administration of the Natural Gas Act or the utilization of natural gas resources, for this Court now to face the issues raised by IP in the Fifth Circuit.

CONCLUSION

For the foregoing reasons, the Solicitor General's petition for certiorari before judgment should be denied with respect to IP's petition for review now pending before the Fifth Circuit in Docket No. 77-3553.

Respectfully submitted.

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SUPREME COURT, U. S.

Supreme Court, U.S.
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Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents*

(The Collateral Proceeding)

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents*

(The Curtailment Proceeding)

No. 71-1040

UNITED GAS PIPE LINE CO. and PENNZOIL UNITED, INC., *Petitioners*

v.

LOUISIANA POWER & LIGHT CO., *Respondent*

UNITED GAS PIPE LINE CO., *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents*

(FPC Opinion 606)

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

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(FPC Opinion 606)

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Preliminary Statement

Shell Oil Company, a party intervenor before the United States Court of Appeals for the Fifth Circuit in the so-

called "curtailment proceeding",[1] opposes the Petitions for Writs of Certiorari filed herein by the Solicitor General on behalf of the Federal Power Commission and by United Gas Pipe Line Company and Pennzoil United, Inc. The issuance of writs of certiorari herein, on issues not yet ripe for review by this Court, will raise serious constitutional questions which need not be raised if the normal and statutorily-provided courses of administrative action and judicial review are allowed to proceed.

Each of the petitions seeks review of the decision of the Fifth Circuit in Case No. 71-2550, *Louisiana Power & Light Co. v. United Gas Pipe Line Company, et al.* (Appendix A, Solicitor General's petition, page 1a) herein referred to as "the injunction case". In addition, petitioners seek review of Federal Power Commission Opinions Nos. 606 and 606-A entered in Docket Nos. RP71-29, *et al.*, *United Gas Pipe Line Company* (Appendices E and F, Solicitor General's petition, pages 48a through 84a). These Commission opinions, which are now pending on applications for review in the Fifth Circuit, are herein referred to as "the curtailment case".

Statement of the Case

Shell adopts the statement of the case in the Solicitor General's petition, with one addition. The Fifth Circuit's

1. The lead case in the Fifth Circuit seeking review of the Federal Power Commission's Opinions Nos. 606 and 606-A is *Louisiana Power & Light Co.* and *New Orleans Public Service, Inc. v. Federal Power Commission*, Case No. 71-3429. Shell Oil Company was also a party to the Commission's proceeding in which Opinions Nos. 606 and 606-A were entered (F.P.C. Dockets Nos. RP71-29, *et al.*). None of the decisions of which review is sought herein have been published. They are, however, reproduced in full in the Appendices to the petitions filed herein. Reference will be made thereto as required.

decision in the injunction case held that the Federal Power Commission lacked jurisdiction over United's "Green System"[2] from which deliveries were being made to one of the LP&L facilities. On February 9, 1972, the Commission issued its Opinion No. 610[3] holding to the contrary. Applications for rehearing of this Opinion may be filed with the Commission at any time prior to March 10, 1972.[4]

Jurisdiction to Review Opinion No. 606 Prior to the Court of Appeals Review

The Solicitor General's petition (page 21) refers to the uncertainty of this Court's power to issue a writ of certiorari where the decision to be reviewed has been entered by an administrative agency and no decision thereon has been entered by any court. Review by writ of certiorari before rendition of judgment is provided in 28 U.S.C. § 1254(1), and Rule 20 of the Rules of the Supreme Court provide for a writ of certiorari to review a case pending in a court of appeals "before judgment is given in such court". In the body of this Rule, reference is made to seven cases,[5] but in all seven, judgments or orders had

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2. The "Green System" is United's pipeline system in the New Orleans area which has traditionally been operated as a separate intrastate system.

3. FPC Docket No. CP71-89, *United Gas Pipe Line Company* (Appendix F, United-Pennzoil petition, page 91a).

4. Section 19a of the Natural Gas Act (Appendix A hereto), 52 Stat. 821, 56 Stat. 84, 15 U.S.C. § 717r.

5. *United States v. Bankers Trust Co.*, 294 U.S. 240; *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330; *Rickert Rice Mills v. Fontenot*, 297 U.S. 110; *Carter v. Carter Coal Co.*, 298 U.S. 238; *Ex parte Quirin*, 317 U.S. 1; *United States v. United Mine Workers*, 330 U.S. 258; *Youngstown Co. v. Sawyer*, 343 U.S. 579.

been entered in some court prior to issuance of the writ of certiorari. The Solicitor General cites *Marbury v. Madison*, 1 Cranch 137, 175, and asks comparison to *Wheeler Lumber, Bridge & Supply Co. v. United States*, 281 U.S. 572, 576. The language quoted from *Marbury v. Madison* points to the essential criterion of appellate jurisdiction, but was not offered as a complete definition thereof. The context is revealed by the Court in the same paragraph, where it distinguishes between directing a mandamus to a court and issuing it directly to a public officer.[6]

Perhaps more useful here is the discussion in the *Wheeler Lumber* case. Although it was actually before the Supreme Court on a certified question (28 U.S.C. §1254 (3)), the arguable breadth of the question prompted the Court to state:

> "There are two reasons why a certification by that court which embraces the whole case cannot be entertained by this court. One is that to accept such a certification and proceed to a determination thereon, in advance of a decision by that court, would be an exercise of original jurisdiction by this court, contrary to the constitutional provision which prescribes that its jurisdiction shall be appellate in all cases other than those affecting ambassadors, other public ministers and consuls, and those in which a state shall be

6. "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction." (1 Cranch at 175-176)

> a party. Art. III, § 2, cl. 2. The other is that the statute permits a certification only of 'definite and distinct questions of law.'" (281 U.S. at 576).

In the *Wheeler Lumber* case, the certified question had been submitted by the United States Court of Claims where the suit had been brought following a tax refund application denial by the Commissioner of Internal Revenue.

In another certified question case decided by this Court, *United States v. Rice*, 327 U.S. 742, the issue was discussed but not decided, concerning the Court's power to decide a case or controversy not within its original jurisdiction and not previously decided by an inferior court. It may be noted in this case, however, that the Court apparently assumes that its appellate jurisdiction is limited to cases decided by inferior courts.[7]

Reference is made to this Court's decision in *Postum Cereal Company v. California Fig Nut Company*, 272 U.S. 693, a trademark case in which a Patent Office examiner's holding for Postum had been appealed to and affirmed by the Commissioner of Patents. An appeal from the Commissioner's decision had been dismissed by the Court of Appeals of the District of Columbia. Because the nature of the dismissal was an administrative decision rather than a judicial judgment, this Court found it had no appellate jurisdiction.

Section 19(b) of the Natural Gas Act provides for review of Federal Power Commission orders by United

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7. "It may be doubted whether the statute contemplates our going beyond the certified question, to decide a case or controversy not within our original jurisdiction, and which, *since no inferior court has decided it, could not be brought here on appeal.*" (347 U.S. at 747, Emphasis supplied).

States Courts of Appeal and provides for the finality of such reviewing court's judgment, "subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 346 and 347 of Title 28". The Supreme Court review contemplated by Section 19(b) is clearly of the court of appeals judgment, not of the administrative agency's order.

The Curtailment Issue

The first question presented in each of the petitions is whether the Natural Gas Act gives the Federal Power Commission jurisdiction to curtail deliveries of natural gas from interstate pipelines to direct industrial customers. This issue arises in the context of natural gas supply shortages of imposing proportions. As a major independent producer of natural gas, Shell is acutely aware of this problem and supports and encourages those efforts by the Federal Power Commission and by the state regulatory bodies which are aimed at reversing the downward trend in the gas supply picture by encouraging increased levels of exploration and development.

In the curtailment case before the Federal Power Commission, Shell did not oppose Commission jurisdiction to curtail direct industrial purchases from interstate pipelines, and we do not propose any such opposition in the review of that case before the Fifth Circuit (if that be where such review is to be conducted). Nor do we offer any such opposition with regard to the review herein of that basic question. The issues relating to this question were well defined by other parties, not only in the curtailment proceeding before the Commission but also in the injunction proceeding before the Fifth Circuit.

Each of the petitioners has pointed to the national importance of this Court determining the curtailment issue. We cannot dispute the importance of the question, and we will not impose further argument to that already presented. Shell's position concerning Opinion No. 606 (the curtailment case) however, does challenge two other aspects of the Commission's holding therein. One is the provision in the Commission decision that would absolve United of all responsibility for damages resulting from the breach of its contract obligations concerning impaired deliveries regardless of United's own acts or omissions which might be proven as the root cause of the impairment situation. This issue is one which Shell will raise on review of Opinion No. 606. It is not an issue of such urgent national concern that it justifies bypassing the Fifth Circuit's review. This particular issue is not presented by the Fifth Circuit decision in the injunction proceeding.

Also present in the curtailment case are issues relating to United's curtailment categories (by types of sale and end use), the levels from which curtailments will be made under United's tariff, and whether a tariff filing is the proper means under the Natural Gas Act of implementing a curtailment program. Other issues, including environmental impact have been referred to the Presiding Examiner for further findings. None of the issues, other than the basic question of Commission curtailment power over direct industrial purchases, is of imperative national urgency, and none is ripe for review herein.

If this Court should grant certiorari to review the Fifth Circuit's injunction decision, it would be consistent with sound judicial administration to decide only the basic issue of Commission jurisdiction to curtail direct industrial

purchases from interstate pipelines. If the Fifth Circuit were affirmed on this point, there would be no change in the present position of the parties. If reversed, the injunction case would be remanded to the Fifth Circuit, which is where the other curtailment issues are being considered on review of the Commission's Opinion No. 606. In either event, the basic question presented by both petitioners is answered, and without bypassing the Fifth Circuit's review of Opinion No. 606.

The other aspect of Commission Opinion No. 606 challenged by Shell relates to the application of United's curtailment to sales made from its intrastate system in the New Orleans area (the "Green System-East"). Because this issue is so inextricably bound to the primary jurisdiction question, the second question presented in each of the petitions herein, it should be discussed in that context.

The Primary Jurisdiction Issue

One of the issues presented in the injunction case was whether United's Green System was subject to Federal Power Commission jurisdiction. The Fifth Circuit held that it was not, inasmuch as it was intrastate in character and commited to Louisiana jurisdiction. Both petitions assign error to the Fifth Circuit for deciding this issue prior to the Commission's determination of jurisdiction over United's Green System.

On February 9, 1972, after the filing of the Solicitor General's motion and petitions, but prior to the filing of the United-Pennzoil petition, the Federal Power Commission issued its Opinion No. 610 in Docket No. CP71-89,

United Gas Pipe Line Company (Appendix F, United-Pennzoil petition, page 91a). In that proceeding several parties, including Shell, had contended that United's "Green-System-East" (the totally uncertificated intrastate system in the New Orleans area) was not subject to Commission jurisdiction. Federal Power Commission Opinion No. 610 held otherwise.

As posed in the Solicitor General's petition, this question is not strictly one of Federal Court jurisdiction but rather whether the Fifth Circuit should have deferred ruling on the "Green-System-East" issue until after the Commission had decided United's certificate case (Docket CP71-89). From the standpoint of Louisiana Power & Light Company (LP&L), such a deferral could destroy the value of the injunctive relief it sought. At the time of the Fifth Circuit decision, more than six (6) months had already passed since the record was closed in Docket CP71-89. Even now the administrative process is incomplete, inasmuch as applications for rehearing of Commission Order No. 610 may be filed any time prior to March 10, 1972, with Commission action thereon to follow. Several questions relating to certification have been remanded to the Examiner for further hearings.

Neither of the petitions asks for review on the merits of the Fifth Circuit's holding on the intrastate character of the Green System. We agree. The Fifth Circuit's decision on this issue was based on a record almost identical to that developed in the Commission hearing in Docket CP71-89. By its active intervention in the injunction case, the Commission participated fully in the development of that record. As pointed out by the Court of Appeals with regard to the Green System issue:

"There is no dispute in the record as to any fact bearing on this point." (Appendix A, Solicitor General's petition, page 22a)

In the certificate proceeding before the Federal Power Commission (Docket No. CP71-89), United and the Commission Staff relied principally on the Fifth Circuit's decision in the *Florida Parishes* case,[8] and Commission Opinion No. 610 did likewise. The same court that decided the *Florida Parishes* case, distinguished that case in its opinion in the *LP&L* injunction decision, and there is no more reason for this Court to review this issue on the merits now than there was when certiorari was denied in *Florida Parishes.*

It would be most unlikely that a decision by this Court would precede the Commission's action on rehearing of its Opinion No. 610, and following such action, that Opinion would be engaged in the process of judicial review on the merits. The question on the merits was decided by the Fifth Circuit on the basis of undisputed physical facts relating to the channel of constant flow. There is nothing to indicate that the applicable legal criteria have changed or will change upon review of Opinion No. 610. Unless additional evidence is developed on rehearing before the Commission, the same undisputed physical facts will also be controlling. Certiorari on the primary jurisdiction question, while raising some interesting legal points, would not work toward resolution of the issue on the merits.

The Fifth Circuit's Opinion refers to a leading text in the administrative law field, K. C. Davis, *Administrative*

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8. *Louisiana Public Service Commission v. F.P.C.*, 359 F.2d. 525 (5th Cir. 1966), *cert. den.* 385 U.S. 833.

Law Treatise, concerning whether administrative jurisdiction may be challenged in advance of exhaustion of administrative remedies. This treatment of the subject matter has a most pointed relevance to the instant case as it states:

> "When irreparable injury will result from the administrative proceeding and the lack of jurisdiction clearly appears from considerations which are not within the agency's specialized understanding, imposing the exhaustion requirement would be both unjust and unfair." (3 K.C. Davis, Administrative Law Treatise, § 20.03, Ch. 20, page 68)

The Fifth Circuit has remanded the injunction case for further fact development on the issue of irreparable injury. Concerning the clear lack of administrative jurisdiction, that clarity was found by the same court which decided the *Florida Parishes* case[9] on which the proponents of jurisdiction principally relied. As to the essential considerations on which the jurisdictional determination was based, all of these were uncontradicted facts fully developed for the Court. There was no area of specialized agency understanding with any bearing whatsoever on this determination. Certiorari should not be granted on the primary jurisdiction issue.

Conclusion

The Petitions for Writs of Certiorari in the curtailment proceeding should be denied. The normal appellate processes will better serve the public interest, as well as the interest of sound judicial administration, in view of the number and complexity of the issues presented and in

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9. *Louisiana Public Service Commission v. F.P.C.*, *supra*.

view of the lack of national urgency as to all except the basic issue. The review of Commission Opinion No. 606 should proceed in the Fifth Circuit. To short circuit that review will raise questions of this Court's jurisdiction which need not be raised if normal judicial processes are allowed to continue. The only issue in that case for which justification of immediate settlement is offered by the petitioners is the basic question of Commission jurisdiction to curtail direct industrial purchases from interstate pipelines. This issue is also squarely presented in the injunction case and, if considered there, would not involve any deviation from the statutory appellate processes. If certiorari is granted in the injunction case, it should be limited to the question of Commission jurisdiction to curtail direct industrial purchases from interstate pipelines. This issue was the first question presented in each of the petitions herein. On no other issue should certiorari be granted.

Respectfully submitted,

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February 28, 1972

Appendix A

Natural Gas Act, Section 19

Section 19:

Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the

natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commisison upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered; as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be con-

clusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1938, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947; 15 U.S.C. § 717r.

Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

MOTION FILED

MAR 2 1972

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,
v.
LOUISIANA POWER & LIGHT CO., ET AL.,
(The Collateral Proceeding)
Respondents.

FEDERAL POWER COMMISSION,
Petitioner,
v.
LOUISIANA POWER & LIGHT CO., ET AL.,
(The Curtailment Proceeding)
Respondents.

No. 71-1040

UNITED GAS PIPE LINE CO. AND PENNZOIL UNITED, INC.,
Petitioners,
v.
LOUISIANA POWER & LIGHT CO.,
Respondent.

UNITED GAS PIPE LINE CO.,
Petitioner,
v.
LOUISIANA POWER & LIGHT CO., ET AL.,
(FPC Opinion 606)
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF HUMBLE OIL & REFINING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE HUMBLE OIL & REFINING COMPANY IN OPPOSITION

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IN THE

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF HUMBLE OIL & REFINING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Humble Oil & Refining Company ("Humble") hereby respectfully moves the Court for leave to file the attached "Brief of Amicus Curiae Humble Oil & Refining Company in Opposition." Such brief is respectfully submitted in opposition to this Court's review of only *one* of the questions presented in the petition for writs of certiorari filed by the Solicitor General of the United States on behalf of the Federal Power Commission ("Commission") in No. 71-1016, *Federal Power Commission* v. *Louisiana Power & Light Co., et al.* (The Collateral Proceeding), *i.e.* (Pet. p. 5):

> "Whether the Federal Power Commission, rather than the courts, should make the initial determination of the Commission's jurisdiction to issue a certificate of public convenience and necessity authorizing a jurisdictional interstate pipeline company to continue to operate certain pipeline facilities."

The attached brief is also respectfully submitted in opposition to this Court's review of only *one* of the questions presented in the petition for writs of certiorari filed jointly by United Gas Pipe Line Company and Pennzoil United, Inc. (hereinafter collectively referred to as "United") in No. 71-1040, *United Gas Pipe Line Co.* and *Pennzoil United, Inc.* v. *Louisiana Power & Light Co.*, *i.e.* (Pet. p. 2):

> "Whether a court has jurisdiction to determine the Federal Power Commission's jurisdiction over facilities being operated by an interstate pipeline when the jurisdictional issue presented to the court is at that very time being litigated at the Commission."[1]

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[1] Humble *emphasizes* that it does *not* oppose either the Commission's or United's petitions for writs of certiorari to the extent that

[Footnote continued on next page]

The Solicitor General of the United States on behalf of the Commission (No. 71-1016) and counsel for United (No. 71-1040) have consented to Humble's filing the attached brief *amicus curiae*. Counsel for respondent Louisiana Power & Light Company ("LP&L") has also consented to the filing of the attached brief. Humble respectfully submits that the consent of these principal parties satisfies the intent of Rule 42(1) of the Rules of this Court which provides in pertinent part that a "brief of an *amicus curiae* prior to consideration . . . of the petition for writ of certiorari, filed with the consent of the parties, . . . *may be filed* only if submitted a reasonable time prior to the consideration . . . of the petition for writ of certiorari" (emphasis added). Humble's interest in these proceedings stems from the Fifth Circuit's decision in *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co., et al.*, No. 71-2550 (judgment entered, January 14, 1972)[2] that it had the authority to determine, and did determine, that United's "Green System" is not subject to the Commission's jurisdiction under the Act. Since the only parties to that proceeding were United, LP&L and the Commission, it is respectfully submitted that their consent should satisfy the purpose of Rule 42(1).

[Footnote continued from previous page]

such petitions seek this Court's review of the *important question* of whether the Commission has the authority, under the Natural Gas Act ("Act"), Act of June 21, 1938, as amended, 52 Stat. 821, as amended (1938), 15 U.S.C. §§ 717-717w, to, in times of natural gas shortage, allocate the interstate gas supplies of an interstate pipeline company between direct and resale customers of such company.

[2] United Apps. A and B, pages 1a-29a. With the filing of its petition for writs of certiorari, United submitted several appendices including, among other things, the opinion and judgment, below. References herein shall be to United's appendices.

Humble's interest in these proceedings arises from its status as a producer and seller of substantial volumes of natural gas in intrastate commerce to United which is delivered into United's Green System. In addition, Humble is also a producer and seller of substantial volumes of natural gas to United in interstate commerce. In *United Gas Pipe Line Co.*, FPC Docket No. CP71-89, United applied to the Commission for a certificate of public convenience and necessity under Section 7(c) of the Act, 15 U.S.C. § 717f(c) (United App. D, pp. 48a-49a), authorizing it to continue operating, *inter alia*, its Green System on an interstate basis. Humble intervened in FPC Docket No. CP71-89 and actively participated therein opposing Commission assertion of jurisdiction over the Green System. On February 9, 1972, the Commission, Commissioner Carver dissenting, issued its Opinion No. 610, "Opinion and Order Finding Jurisdiction and Remanding Proceeding for Receipt of Additional Evidence" in FPC Docket No. CP71-89, in which it determined that it had jurisdiction over United's Green System (United App. F, pp. 91a-131a). That determination may have a substantial impact upon Humble's intrastate sales into United's Green System.

Humble believes that the Fifth Circuit had the authority to, and correctly decided, the jurisdictional status of United's Green System, on the basis of the record before it, and under the Act and guiding precedent. Humble respectfully submits that its participation herein as *amicus curiae* will materially assist the Court in its determination of whether to take certiorari on the question of whether the Fifth Circuit acted reasonably in the circumstances by declining to invoke the doctrine of "primary jurisdiction," and by determining that the Green System is not subject to the Commission's jurisdiction under the Act. It is respectfully submitted that

the brief which Humble is requesting permission to file herein will contain a complete argument on this question.

Respectfully submitted,

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March, 1972

BRIEF OF AMICUS CURIAE HUMBLE OIL & REFINING COMPANY IN OPPOSITION

INTRODUCTION

Humble respectfully submits herewith its brief *amicus curiae* opposing the petitions for writs of certiorari filed by the Commission and by United *only* to the extent that such petitions seek this Court's review of the Fifth Circuit's decision in *Louisiana Power & Light Co. v. United Gas Pipe Line Co., et al.* (see Motion *supra*, p. 2a), holding that it had the authority to determine that United's Green System is not subject to the Commission's jurisdiction under the Act (United App. A, pp. 22a-25a).[1]

The petition for writs of certiorari filed by United adequately sets forth the opinions below, the jurisdiction of this Court, and statutes involved, to the extent relevant to this question, and, in the interest of brevity, Humble adopts those statements.

STATEMENT

The petition for writs of certiorari filed by the Commission adequately summarizes the proceedings relevant to the question of whether the Court below properly exercised its discretion in declining to invoke the doctrine of primary jurisdiction and in determining that the portion of United's Green System which serves LP&L's

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[1] The extent of Humble's opposition to the Commission's and United's petitions for writs of certiorari is set forth in its Motion seeking leave to file this brief (Motion, *supra*, p. 1a). Humble again *emphasizes* that it does *not* oppose the Commission's and United's petitions for writs of certiorari to the extent that such petitions seek review of the *important question* of the Commission's authority to allocate the available gas supplies of jurisdictional pipeline companies in times of gas supply shortage.

Nine Mile Point generating station was not subject to the Commission's jurisdiction under the Act (Commission Pet. pp. 9-11). Humble adopts such statement.

QUESTION PRESENTED

Was the Court below required by the doctrine of "primary jurisdiction," in the circumstances of the case at bar, to refrain from deciding the purely legal question of whether United's Green System was subject to the Commission's jurisdiction under the Act, where: (1) both the Court and the Commission had before them the essential operating characteristics of the pipeline facilities involved developed on separate records and in the Court proceedings the relevant facts with respect to the jurisdictional issue were developed with the aid and participation of the Commission; (2) the determination of the question of jurisdiction merely required the application of existing law to those facts and did not involve any Commission expertise, skill, or discretion; (3) the question of jurisdiction did not require Commission consideration of any national policy or other transcending public policy considerations; and (4) the question of primary jurisdiction was fully briefed to the Court by all parties to the proceeding, including the Commission?

ARGUMENT

A. The Court Below Was Not Required by the Doctrine of Primary Jurisdiction, in the Circumstances of This Case, to Refrain From Deciding the Question of Whether United's Green System Was Subject to the Commission's Jurisdiction Under the Act and Acted Reasonably in the Circumstances in Correctly Deciding Such Question

The fundamental question presented by the petitions for writs of certiorari reduces itself to whether the Court below was required, in the circumstances of *this* injunction proceeding, by the doctrine of primary jurisdiction,

to refrain from deciding, on the basis of the record made in a trial court of competent jurisdiction, the *purely legal* question of whether United's Green System is jurisdictional under Section 1(b) of the Act, 15 U.S.C. § 717(b) (United App. D, p. 43a). The answer to this question must be made in the context of the facts of *this* particular case, *i.e.*: (1) that the Court below had before it a record developed in a trial court of competent jurisdiction relating to the essential operating characteristics of the pipeline facilities involved; (2) in the Court proceedings the relevant facts with respect to the jurisdictional issue were developed with the aid and participation of the Commission; (3) that the determination of the question was solely one of law involving the application of the Act and guiding precedent to the facts of record; (4) that the determination of the question did not require any Commission expertise, skill or discretion; (5) that the question itself did not involve any overriding public policy considerations upon which the Commission should have the first opportunity to pass; and (6) that the question of primary jurisdiction was fully briefed and argued to the Court below by all parties to the proceeding, including the Commission. Humble respectfully submits that the Court below not only had the authority to and correctly decided such question but also that it acted reasonably in the circumstances.

This Court has often considered the doctrine of primary jurisdiction. The application of the doctrine requires the exercise of sound discretion by the Court involved, having regard to the particular circumstances of each case. The "principal reason behind the doctrine is recognition of the need for orderly and sensible coordination of the work of agencies and of courts" 3 Davis, *Administrative Law Treatise*, § 1901. The "principal criterion in deciding whether the doctrine is applicable . . . usually is *judicial appraisal* of need or lack of need for

resort to administrative judgment" (*id.* at § 19.09, emphasis added).

In *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952), this Court reiterated the pertinent criteria to be applied in determining whether a court should invoke the doctrine of primary jurisdiction, when it stated (emphasis added):

> *"The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.* This as [sic] so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

The case at bar clearly did not raise "issues of fact not within the conventional experience of judges." Nor did it require the "exercise of administrative discretion." On the contrary, the question of jurisdiction presented to the Court below was solely one of law requiring the application of the Act and guiding precedent to the undisputed facts of record.[2]

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[2] It is important to note that United characterized its filing in United Gas Pipe Line Co., FPC Docket No. CP71-89, (see Motion *supra*, p. 4a), the Commission proceedings involving this question, as its *"Florida Parishes"* compliance case, United Gas Pipe Line Co., FPC Docket No. CP62-161, 30 F.P.C. 560, *reh. denied*, 31 F.P.C. 1152 (1964), *aff'd.*, Louisiana Pub. Serv. Comm'n. v. FPC, 359

[Footnote continued on next page]

It is all important to recognize that the Commission voluntarily and actively participated in the proceedings below and aided in the development of the record on the jurisdictional question. Thus, the Commission responded to the pleadings filed in the proceedings below and moved to dismiss the injunction proceedings. The Commission participated fully in the cross-examination of United's witnesses on the flow of gas in the Green System, introduced evidence on the type of gas flowed into the Green System (*i.e.*, gas sold pursuant to certificates of public convenience and necessity) and introduced into evidence "the entire excerpts from the proceedings [before the Commission] in the certificate" case (R. 300).

In these circumstances, reference to the Commission was rendered unnecessary. Justice Frankfurter well summarized this rule of law and the precedent upon which it is founded in a somewhat different though analogous context dissenting in *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U.S. 481, 521 (1958):

> "Contrariwise, where a decision of a case depends on determination of a question of law as such, either because of explicit statutory outlawry of some specific conduct or by necessary implication of judicial power because not involving the exercise of administrative discretion or the need of uniform application of specialized competence, the doctrine of primary jurisdiction has no function, because there is no occasion to refer a matter to the administrative agency. Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (reaffirmed in United States v. Western Pacific R. Co., 352 U.S. 59, 69, 77 S. Ct. 161, 167, 1 L.Ed. 2d 126); Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578;

[Footnote continued from previous page]

F.2d 525 (5th Cir. 1966), *cert. denied*, 385 U.S. 833 (1966). The Circuit below is the Circuit which decided *Florida Parishes* on appeal from the Commission's decision.

> Civil Aeronautics Board v. Modern Air Transport, Inc., 2 Cir., 179 F.2d 622, 624-625; see Davis, Administrative Law, 666-668."

The Court below knew of the existence of the certificate proceedings pending before the Commission in FPC Docket No. CP71-89 (United App. A, p. 4a). It stated, however, that it "must determine whether minor diversions of interstate gas have converted a wholly state-contained pipeline system to an interstate facility" (*id.* p. 2a). The Court below continued that "until recently, all of the gas delivered to [LP&L's Nine-Mile] station only traveled in a pipeline system, designated the 'Green System,' which gathered and disposed of gas wholly within the confines of the State of Louisiana. However, in 1970 United chose to divert 2.6% of the gas supplied under its Nine-Mile Station contract into the Green System from its interstate system, designated the 'Black System'" (*id.* pp. 3a-4a). In this regard, the Court below stated that it was "particularly significant that this minor amount of interstate gas had been introduced *into* the Green system, and that no intrastate gas could flow *from* the Green system into the Black system because of the pressure differential between the systems" (*id.* p. 22a, emphasis in original). The Court thus held that these facts, among others, did not render the Green System jurisdictional under the Act, the decision of the Fifth Circuit in *Florida Parishes* (*supra*; pp. 5-6, n. 2), or the decisions of this Court in *People of the State of California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), or *FPC* v. *Amarada Petroleum Corp.*, 379 U.S. 687 (1965), and stated (United App. A, pp. 23a-25a, emphasis added):

> "In determining whether a particular gas delivery system is subject to federal regulation . . . [the] court must examine 'the anatomy of the pipeline system to discover the channel of constant flow' to see if, in fact, gas crosses a state line at any stage of its movement from well-head to ultimate consump-

tion. If it does, it is interstate gas (citations omitted).

"The lower court held that this analysis of constant flow required agency expertise and that it should refuse to exercise its jurisdiction and require exhaustion of administrative remedies. *Without adopting any sweeping or dogmatic contrary rule for every imaginable case, we disagree in the case at bar. The solution to the legal problem here depends upon simple flow mechanics, which are demonstrated in this record by uncontradicted evidence. It requires no expertise to determine that the channel of constant flow, insofar as the gas passed through and consumed from the Green system is concerned, is essentially within the State of Louisiana.*

* * * *

". . . the flow of gas from the Black system into the Green system in the case at bar is occasional and irregular, as well as minimal. The Green system, as an entire and separate unit, is physically located in and functions entirely in Louisiana. Therefore, the undisputed facts show that the channel of constant flow is an intrastate and not an interstate channel. The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction (footnote omitted)."

The Court's decision is neither more nor less of a legal determination than a reviewing court could make under Section 19(b) of the Act, 15 U.S.C. § 717r(b) (United App. D, pp. 52a-54a), which empowers a reviewing court to "affirm, modify, or set aside [a Commission] order."[3]

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[3] It would appear that the courts are not precluded from passing upon the merits of legal questions which have not been passed upon by the agency involved where there is a record upon which a legal conclusion may be rendered and "persuasive reasons" exist for such action. *Cf.* Permian Basin Area Rate Cases, 390 U.S. 747, 823-824 (1968).

The Court below did not arrogate to itself a purely administrative determination. Nor did the decision which the Court rendered require any expertise, skill or discretion on the Commission's part. Certainly, it did not involve the determination of a question with transcending public policy considerations.[4] The Court's action was not only eminently reasonable in the circumstances of an injunction proceeding but clearly comported with the rule of law that the doctrine of primary jurisdiction performs no office where, as here, the question involved is a legal one traditionally considered to be within the province of the appellate courts by the "necessary implication of judicial power" (*Federal Maritime Board* v. *Isbrandtsen Company, supra*, 356 U.S. p. 6 521).

B. Petitioners Have Failed to Demonstrate any Legal or Policy Reason Requiring This Court to Review the Issue Presented With Respect to the Court's Authority to Determine the Jurisdictional Status of the Green System

The question presented in the so-called "curtailment case" (Commission Pet. pp. 7-11) of the scope of the Commission's authority to allocate the gas supplies of jurisdictional natural gas pipeline companies in times of gas supply shortage is obviously one of fundamental importance to the sound administration of the Act. The answer to this question will have a national impact on the natural gas pipeline industry and the domestic and industrial consumers which such industry serves. However, no such comparable argument can legitimately be made with respect to the narrow legal question of wheth-

[4] It should be noted that the Fifth Circuit (the same circuit that decided the case at bar) applied the doctrine of primary jurisdiction in *J. M. Huber Corp.* v. *Denman*, 367 F.2d 104 (5th Cir. 1966). There, that Circuit invited the parties to invoke the Commission's jurisdiction for a determination of whether it had jurisdiction over royalty payments for natural gas produced and sold in interstate commerce, a question which the Fifth Circuit considered to involve transcending public policy considerations and on which there was no record before the Fifth Circuit.

er the Court below abused its discretion in declining to invoke the doctrine of primary jurisdiction and in determining the jurisdictional status of a relatively small segment of United's huge pipeline system. This question simply does not present any issue of fundamental importance to the Commission's administration of the Act. Further, this Court's determination of the issue of primary jurisdiction does not involve the national regulatory question presented by the curtailment case. A denial of certiorari on the jurisdictional issue does not preclude consideration of the curtailment issue since the latter issue arises on facts relating to service to LP&L's Sterlington Station which takes deliveries from United's interstate system. Conversely, the curtailment issue is not dependent upon the jurisdictional status of United's facilities serving LP&L's Nine Mile Point Station.

Nor does the Fifth Circuit's decision on the question of primary jurisdiction adversely affect the essential role of the agency and the court in the administrative process. Indeed, the decision of the Court below does not conflict with the established doctrine on the question of primary jurisdiction as reflected in this Court's opinions or in the opinions of the various Circuit Courts of Appeals. Rather, the decision of the Court below, in the circumstances of this case, is completely consistent with the doctrine of primary jurisdiction, the application of which must, in any event, be examined on an *ad hoc* basis having regard to all relevant facts.

The important question, which this Court may ultimately decide to consider, as to the Commission's authority over the allocation of available gas supplies of interstate pipeline companies in times of shortage should not be undercut by the narrow legal question of whether the Court below abused its discretion in declining to invoke the doctrine of primary jurisdiction. The purpose of the doctrine of primary jurisdiction, *i.e.*, to defer to

a regulatory agency, to pass upon matters which arguably require its expertise, was clearly satisfied in the circumstances of this case. Here, the Commission exercised full opportunity to develop all of the essential facts of record before the Court. Moreover, the Commission has now had an opportunity to express its views on the jurisdictional status of the Green System. If its Opinion No. 610 was lawfully issued (see, Commissioner Carver's dissent, United App. F, pp. 127a-131a), the Commission's views are subject to judicial review in the normal course.

United asserts that the "Fifth Circuit decided an important issue of Commission jurisdiction which was not before it for review and which, although pending before the Commission in the certificate proceeding [FPC Docket No. CP71-89], had not then been decided by the Commission" (United Pet. pp. 12-13). In the first place, Humble respectfully submits that the question presented here is not an "important issue of Commission jurisdiction" either individually or in comparison with the question presented in the curtailment case since it deals with the Commission's jurisdiction over a relatively small segment of United's huge interstate pipeline system, which segment has been regulated for many years in the public interest by the Louisiana Public Service Commission. Thus, even assuming the Commission does not have jurisdiction over such System, the Louisiana Public Service Commission does and regulates such System to the extent of its constitutional authority. Secondly, the question of the Commission's jurisdiction over the Green System was properly before the Fifth Circuit for review since LP&L's complaint for an injunction against United's curtailing its gas supply at its Nine-Mile Point Station rested, in part, upon its assertion that the Green System was not subject to Commission jurisdiction. Thirdly, it is indeed true that the Commission had not decided the certificate question in FPC Docket No. CP71-89 when the Court decided such question. However, it will be recalled that this

was an *injunction suit* involving vital gas supplies where expedition was required by the public interest. The Commission had the certificate proceeding in FPC Docket No. CP71-89 before it for *seven months* before the case was set for hearing. *Ten months* after the case was set for hearing and one month after the Fifth Circuit had decided the jurisdictional issue the Commission rendered a determination on such question.[5]

United further asserts that the "Fifth Circuit took an incomplete record (footnote omitted) . . . and made factual determinations which had never been passed upon by either the Commission or the lower court" (United Pet., p. 13) in rendering its jurisdictional conclusion.[6] United suggests that this Court compare the analysis of the facts in the decision of the Court below with that in the Commission's Opinion No. 610. Humble also respectfully requests that this Court make such a comparison for it will clearly reveal that the same essential facts with respect to the operation of the Green System

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[5] United's application in FPC Docket No. CP71-89 was "noticed" by the Commission on October 15, 1970. However, the Commission did not set the case for hearing until May 14, 1971. Hearings on United's application commenced on June 7, 1971, and concluded on June 18, 1971. The Commission waived the intermediate decision procedure and all briefs were filed with the Commission by July 30, 1971. Seven months later on February 9, 1972, approximately seventeen months after United filed its application and approximately one month after the Fifth Circuit's decision in Louisiana Power & Light Co. v. United Gas Pipe Line Co., *et al.* (See Motion *supra*, p. 2a) the Commission issued its Opinion No. 610 holding, *inter alia*, the Green System subject to its jurisdiction.

[6] United asserts in this connection that the record before the Fifth Circuit was for the "limited purpose of showing the nature of the issue which was pending at the Commission (citations omitted)" (United Pet. p. 13). But if this is true, it is beside the point. The important point is that regardless of how United tried its case, a record reflecting the essential operating characteristics of the pipeline facilities involved was before the Fifth Circuit for review.

were before both the Court and the Commission.[7] For example, both the Court and the Commission acknowledged that United had flowed small volumes of gas from its interstate Black System into its intrastate Green System (compare United App. A, p. 22a and United App. F, pp. 101a and 102a).

Similarly, the Court below stated that the Green System is located "entirely within the State of Louisiana" (United App. A, p. 22a) and that it is "particularly significant that this minor amount of interstate gas had been introduced *into* the Green system and that no intrastate gas could flow *from* the Green system into the Black system because of the pressure differential between the systems. Although a physical connection permits the Black to Green flow, *the two systems are otherwise entirely separate facilities*" (*ibid.*, emphasis added). This conclusion is supported by the evidence developed at the trial (R. 287; 296-298) and is also consistent with the record developed before the Commission in FPC Docket No. CP71-89.

It is upon these *essential jurisdictional facts*, among others, which were before both the Court and the Commission, that the Court concluded, on the basis of *Florida Parishes* (*supra*, n. 2, pp. 5-6), and other cases, that the Green System was not jurisdictional. There was simply no basic difference between the *essential jurisdictional facts* before the Court and the Commission.[8]

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[7] It should be noted that the Commission's conclusion in Opinion No. 610 (United App. F, pp. 104a-106a) that gas can flow outside of the State of Louisiana from the Green System is directly contrary to the evidence developed through United's witnesses in both the trial court (R. 275-276) and the hearings in FPC Docket No. CP71-89 (T. 323) wherein United's witnesses testified that gas flowing in the Green System could *not* leave the State of Louisiana.

[8] It is true, of course, that the Commission found that substantial volumes of interstate gas would have to be flowed into the Green System in the future (United App. F, pp. 102a-103a). This factor was also a matter of record before the Court below (R. 255-256) but

[Footnote continued on next page]

United asserts that the Court below applied the "wrong legal standard" in determining that the Green System was not jurisdictional (United Pet. p. 13). Thus, United asserts that the Court below relied solely on the "*de minimis* concept" in concluding that the Green System was not jurisdictional (United Pet. p. 13, n. 25). See, *e.g.*, *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 535-536 (1945); *FPC* v. *Florida Power & Light Co.*, 40 U.S.L.W. 4141 (January 12, 1972). However, it does not appear from the Court's opinion that the Court below relied exclusively, if at all, upon this concept in arriving at its jurisdictional conclusion. Rather, the Court below determined that the "channel of constant flow" of the gas produced, transported and consumed in the Green System did not make such System jurisdictional because such "channel of constant flow is an intrastate and not an interstate channel" (United App. A, p. 25a).

The principal cases upon which the Commission and United rely in support of their contention that this case involves an important issue of agency-court relations are basically inapposite to the essential circumstances of the case at bar. For example, both United and the Commission rely upon this Court's decision in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), wherein Bethlehem Shipbuilding Corporation, Ltd., among others, brought suit to *enjoin* the National Labor Relations Board from proceeding with hearings on a complaint alleging unfair labor practices against Bethlehem. The District Court granted the injunctive relief requested and such determination was sustained on appeal. This Court stated that the "question for decision is whether a fed-

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[Footnote continued from previous page]

constitutes no ground for concluding that Commission jurisdiction over the Green System exists. If United will be required to flow substantial volumes of interstate gas into the Green System in the future, it should apply for a certificate and explain to the Commission and other interested parties precisely what transactions it will engage in which it believes will render the Green System jurisdictional.

eral District Court has equity jurisdiction to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by the National Labor Relations Act . . ." (303 U.S. p. 43) and held that the District Court was without power to so enjoin the Board (*id.* p. 47). Thus, this Court protected the agency's processes from unwarranted interference by the District Court.

Although Bethlehem had alleged that the provisions of the National Labor Relations Act were inapplicable to it because its business was not in interstate or foreign commerce, this Court noted that the exclusive "power 'to prevent any person from engaging in any unfair practice affecting commerce' has been vested by Congress in the Board and the Circuit Court of Appeals . . ." (*id.* p. 48), and stated that the Board could have determined whether Bethlehem's activities were in interstate commerce and Bethlehem should have exhausted its administrative remedies in this regard.

In sharp contrast, in the case at bar there was no attempt to *enjoin* the Commission from going forward with the certificate proceedings in FPC Docket No. CP71-89 and the Commission was not enjoined from holding such proceedings. Accordingly, there was no unwarranted interference by the Court below with the Commission's processes. Indeed, as Commissioner Carver stated in his dissent to Opinion No. 610 (United App. F, pp. 130a-131a):

> ". . . this Commission was not an original party [to the case before the Fifth Circuit] but chose voluntarily to intervene for the purpose of arguing its primary jurisdiction (footnote omitted). Knowingly and purposefully, it submitted to the jurisdiction of the courts which have so far considered the matter. 'An administrative body which submits a legal question to a court of competent jurisdiction is bound by

its judgment' *Otis & Co.* v. *SEC*, 176 F.2d 34 (CADC, 1948)."

Moreover, the Commission does not have "exclusive power" under the Act to determine the extent of its own jurisdiction. This was recognized by the Court below when it stated in another context that it would be a "strange, Frankenstein sort of legislative delegation that would empower the agency it creates to declare its own extent" of jurisdiction (United App. A, p. 26a). Finally, unlike *Myers*, the Court below had a record before it on the question of the jurisdictional status of United's Green System which did not require expert administrative analysis but rather expert legal analysis which the Court legitimately performed.

This Court's decision in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962), is equally inapplicable to the circumstances of the case at bar. There, a state trial court had asserted jurisdiction over a labor dispute which was arguably within the jurisdiction of the National Labor Relations Board and had enjoined the Marine Engineers Beneficial Association and its Local 101 from, *inter alia*, picketing the Interlake Steamship Co. The trial court's injunction was sustained by the Minnesota State Supreme Court which had determined that the labor organizations involved "were not 'labor organizations' within the meaning of § 8(b) of the Labor Management Relations Act, . . . and therefore not subject to the unfair labor practice provisions of that section of the statute" (370 U.S. p. 174). This Court reversed and stated that "it has hardly been disputed, nor could it be, that the petitioners' conduct was of a kind arguably prohibited by § 8(b)(4)(A) of the Act and thus within the primary jurisdiction of the Board, if MEBA and Local 101 were 'labor organizations' within the contemplation of Section 8(b) generally (footnote omitted)" (*id.* p. 176-177). This Court held that it could foresee "no reason to assume that the task of inter-

preting and applying the statutory definition of a 'labor organization' does not call for the same *adjudicatory expertise* that the Board must bring to bear when it determines the applicability of §§ 7 and 8 of the Act, to substantive conduct. *Indeed, analysis of the problem makes clear that the process of defining the term 'labor organization' is one which may often require the full range of Board competence*" (*id.* p. 178, emphasis added). In this regard this Court alluded at various times to the "informed discretion" of the Board (*id.* p. 178, n. 6), the "policy considerations" which the Board must consider (*id.* p. 181) and the necessity of the Board to be "free in the first instance to consider the whole spectrum of possible approaches to the question" (*ibid.*) of what constitutes a "labor organization" under the Act. Moreover, as this Court noted, there was "persuasive evidence" that the petitioner was a labor organization within the scope of the relevant legislation and that the "state court was shown not simply the arguable possibility of Labor Board jurisdiction over the controversy before it, but that the Board had *actually determined* the underlying issue upon which its jurisdiction depended, i.e., that MEBA was a 'labor organization' for purposes of Section 8(b) of the Act" (*id.* p. 184, emphasis added).

The case at bar simply does not present comparable circumstances. In the first place, there was no question presented here which required the Commission's informed judgment, discretion or skill with respect to a finding that the Green System was nonjurisdictional. Nor did such a question require the application of national policy. Here, the jurisdictional question was solely one of law, which did not require agency expertise and which the Court had ample authority to decide.

CONCLUSION

Humble respectfully submits, for the reasons stated herein, that the Court below properly exercised its discretion in declining to invoke the doctrine of primary jurisdiction and in determining the jurisdictional status of the Green System and review of such narrow determination is simply not required. Accordingly, Humble respectfully requests that the Court deny United's and the Commission's petitions for writs of certiorari on this question.

Respectfully submitted,

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October Term, 1971

No. 71-1016

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FEDERAL POWER COMMISSION,
Petitioner

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent

(The Injunction Proceeding)

FEDERAL POWER COMMISSION,
Petitioner

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL
Respondents

(The Curtailment Proceeding)

RESPONSE TO MOTION FOR EXPEDITED CONSIDERATION AND BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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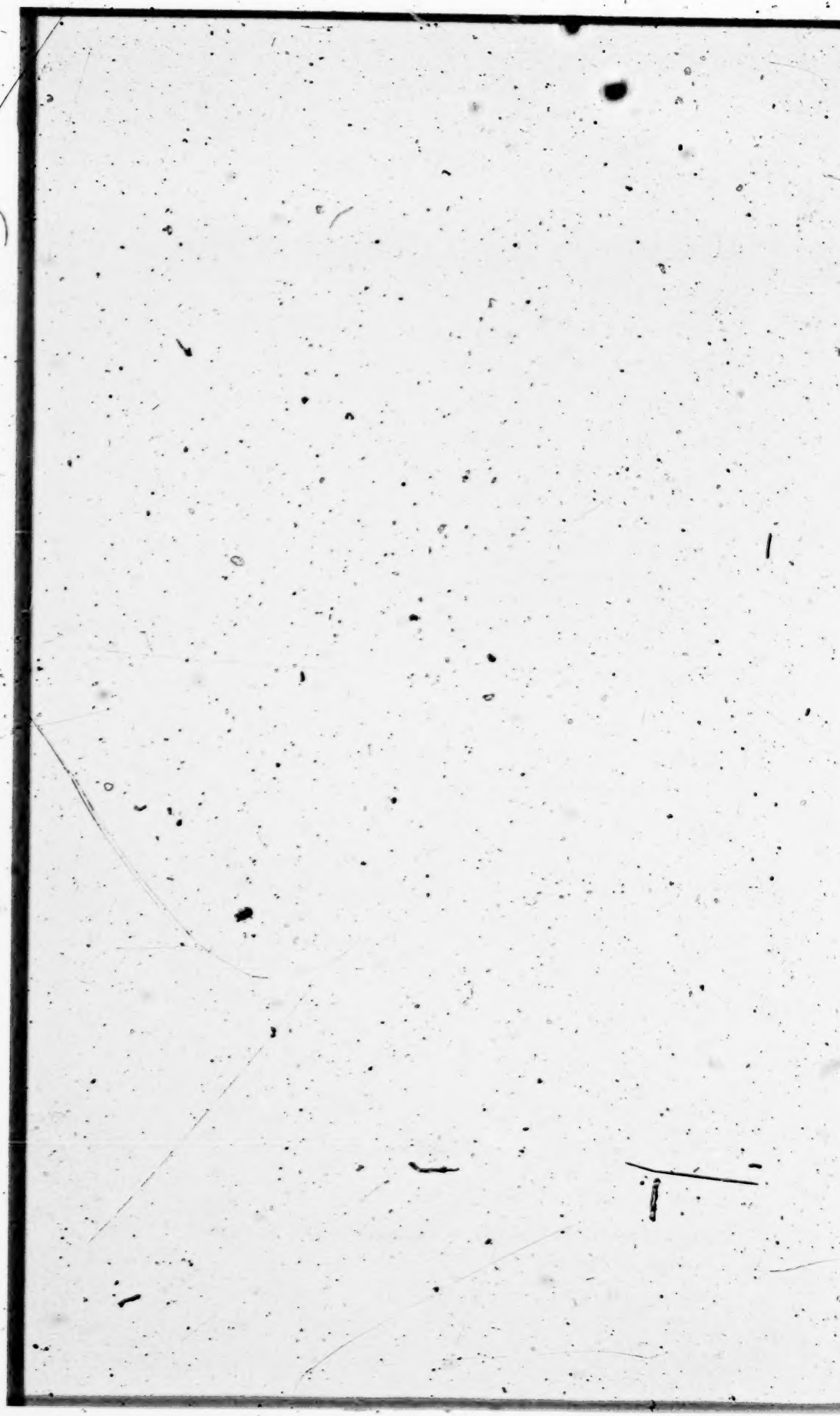

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PREAMBLE

The petition herein is of such an irregular nature that this brief may be somewhat lenghier than would ordinarily be necessary to demonstrate the petition's lack of merit.[1]

[1] The petition's first irregularity shows up in the caption. There appears an attempt to characterize the suit ("The Collateral Proceeding") as part of the caption. The fact is that Louisiana Power & Light Company (LP&L) was the sole plaintiff in the first captioned case and it was a suit solely against Pennzoil-United, Inc., and its wholly-owned subsidiary, United Gas Pipe Line Company (United).

Probably the most important irregularity in the petition is an intangible that permeates the document, i.e., the abandonment by the FPC of its regulatory role and its adoption of the stance of the protector of United.[2] Embracing that position has caused FPC to (a) request this Court to review an FPC Order (No. 606) while it is pending review before the Court of Appeals for the Fifth Circuit, (b) attempt to convince this Court, by assertions not part of any record herein, that there is a national fuel crisis that can only be met by giving FPC an extended and extra-statutory authority for which there is no demonstrated need, and (c) attempt to mis-interpret decisions of this Court that were used by the Court of Appeals as guides to its decision in the Injunction Proceeding, all in order to buttress FPC's claim that the decision below is in conflict with decisions of this Court. Our opposition addresses itself to these matters.

JURISDICTION

There is unquestionably jurisdiction of the Injunction Proceeding under 28 U.S.C. § 1254 (1). However, the Curtailment Proceeding arises from an FPC order, an administrative agency determination, presently pending review before the Court of Appeals, and the jurisdiction attempted to be invoked would be original rather than appellate in nature, and thus should be denied.

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for an injunction against their breach of gas supply contracts with LP&L. The Federal Power Commission (FPC) was not a party until it voluntarily intervened, and the suit made no attack upon any FPC proceeding. (See LP&L's complaint attached as Appendix "J") Mention of these irregularities would be omitted if they were picayunish, but, as will be noted throughout, they are significant. The first case will hereafter be referred to as "The Injunction Proceeding."

[2] See Commissioner Carver's description of the FPC's behavior here, at pp. 2 and 5 of his dissent in the so-called "Certificate Proceeding," Appendix "K" hereto.

QUESTIONS PRESENTED[3]

1. In the Injunction Proceeding: Whether a United States District Court has jurisdiction of a suit for breach of two contracts involving direct sales of natural gas to an industrial customer for its ultimate consumption, one of which contracts is fulfilled by furnishing gas produced, transmitted, delivered and consumed wholly in the State of Louisiana.

2. In the Curtailment Proceeding: Whether this Court should assume jurisdiction to review an administrative agency order when such order is pending review before a Court of Appeals.

STATEMENT OF THE CASE

In late October 1970, United filed with the FPC a petition for declaratory order that would permit United to curtail gas deliveries during the period from November 1, 1970 to April 1, 1971 on a system of priorities that would be in direct conflict with and defeat of the priority rights afforded LP&L in its contracts with United. (R. 6,425)[4] LP&L intervened in that proceeding (the Curtailment Proceeding) on November 25, 1970, alleging among other things that the FPC did not have jurisdiction of the United-LP&L contracts due to the direct sale exemption in Section 1 (b) of the Natural Gas Act. (R. 426) LP&L agreed, along with practically all of United's customers, upon the November 1970–April 1971 curtailment program because it had no adverse effect upon LP&L's system capabilities. (R. 6) However, United filed a supplemental application on February 22, 1971 for a curtailment program to extend from April 1, 1971 to October 31, 1971, which, it appeared

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[3]The Questions Presented in the petition have been framed in such self-serving manner that they fail to define the issues herein.

[4]"R." refers to the record before the Court in the Injunction Proceeding. (See also Appendix "A", p. 3a)

to LP&L, might have an adverse effect on LP&L's system capabilities. (R. 6) When United refused to remove LP&L from that program and honor its contracts with LP&L, this suit was instituted on March 31, 1971. The suit was brought by LP&L alone against Pennzoil United, Inc., and United Gas Pipe Line Company, claiming breaches of two gas supply contracts—one for LP&L's Sterlington Generating Station, the other for LP&L's Nine-Mile Point Generating Station (R. 1-10, 17, 129)—and requesting injunctive relief to stop United from effecting the reduction proposed (for the next day) in the amount of gas being delivered under the contracts.

However, as a result of assurances given by United's counsel in a conference before the District Judge on March 31, 1971, that the proposed reduction would be minimal (7/10 of 1%) for the April-October period, LP&L withdrew its request for a temporary restraining order, and a briefing schedule was set.

On April 26, 1971 the United dispatcher advised LP&L that the gas to be delivered to LP&L's Nine-Mile Point Station that day would be reduced to some 47,000 Mcf although the contract entitled LP&L to 80,000 Mcf per day at that Station. LP&L filed a Supplemental Complaint the next day, alleging the additional breach and renewing its request for a temporary restraining order. (R. 163) After hearing argument on the matter for some two hours,[5] the District Judge issued a restraining order on April 27. The FPC moved to intervene on April 28 and filed a motion to dismiss for lack of jurisdiction. (R. 185) Without any hearing, the District Judge dissolved the restraining order and dismissed LP&L's suit on April 29. (R. 187)

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[5] At p. 10 of its petition the FPC describes this as "an *ex parte* hearing." While this is supposed to suggest that no Court agrees with LP&L's position once the other side is heard, the fact is that United and Pennzoil were represented by multiple counsel and presented the identical arguments made by FPC below.

LP&L applied for writs of mandamus and certiorari on May 1. The Circuit Judge to whom the application was allotted declined to pass on the merits, but issued a stay of the District Court's order of April 29, and reinstated the restraining order of April 27. (R. 189) On May 5, 1971, a panel of Judges Wisdom, Coleman, and Simpson conducted a hearing on the writ application, and on May 14 (a) reaffirmed Judge Wisdom's order vacating the judgment of dismissal, (b) remanded the case to District Court for expedited hearing on the jurisdictional issue, and (c) continued the stay in effect pending hearing and judgment by the District Court. (R. 192)

A hearing was conducted on May 27, 1971 solely on the jurisdictional issue. The District Court dismissed the suit on June 30, holding that "the curtailment proceedings are well within the jurisdiction of the FPC" and LP&L must therefore exhaust its administrative remedies in the FPC before coming to Court. (R. 421-439) LP&L went forward with an expedited appeal.

The Court of Appeals heard argument on November 18 and issued its opinion on January 14, 1972, reversing the District Court and remanding for a full hearing on the merits. (Appendix "A")[6] The gravamen of the Court of Appeals opinion was that the direct sales subject of this suit were exempt under Section 1(b) of the Natural Gas Act from FPC jurisdiction; and, further, that the pipeline from which United served LP&L's Nine-Mile Point Station was an intrastate facility and thus exempt from FPC jurisdiction.

REASONS WHY WRITS SHOULD NOT BE GRANTED

The FPC specifies two reasons why writs should be granted: (a) The fundamental importance to the administration of the Natural Gas Act and to the utilization of the natural gas resources with which that Act is concerned; and

[6] Appendix references "A" through "I" are attachments to the FPC petition; from "J" onward at rear of this brief.

(b) the decision below "conflicts in principle" with prior decisions of this Court. Our discussion will adopt that order.

A. THE DECISION BELOW IS OF NO FUNDAMENTAL IMPORTANCE TO THE ADMINISTRATION OF THE ACT OR TO THE UTILIZATION OF NATURAL GAS WITH WHICH THE ACT IS CONCERNED.

The FPC draws a picture (pp. 13-16 of its petition) of its dire need for authority to regulate curtailment of *all* of United's customers, jurisdictional and non-jurisdictional, that picture being embellished with calculations that are raw speculation based upon United's predictions rather than record facts. FPC's argument as to "need" is one addressed to Congress, as eloquently said by the Court of Appeals:

> "Necessity may be the mother of invention, but need must have the paternal spouse—a legislative grant—to beget agency authority."

More important, however, is the distortion of the picture drawn by FPC. The *hard facts* are as follows:

As shown by United's own Exhibit 22 in the Curtailment Proceeding (Appendix "L" hereto), it has altogether 55 pipeline, city gate, and industrial contracts with 46 separate entities. Of those 55, eight contracts are with pipeline resale customers and five are with city gate resale customers, leaving 42 contracts with direct sale customers exempt from FPC jurisdiction. Of those 42 contracts, nine are with electric utility companies [Gulf States Utilities Company, LP&L (at two stations), Mississippi Power Company (at three stations), Mississippi Power & Light Company, New Orleans Public Service, Inc. (it is both a city gate and a boiler fuel customer), and South Mississippi Electric Power Association].

The significance of these statistics comes from a knowledge of the curtailment provisions of United's contracts with the 33 non-utility industrial customers and the 9 utility direct sale customers. So far as we can determine from

a diligent search of the Curtailment Proceeding and other sources available, the 33 non-utility industrial customers as well as all of the utility direct sale customers, have "Impairment of Delivery" provisions reading substantially and substantively identical to the following from one of those contracts:

"IMPAIRMENT OF DELIVERIES

> Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers." (In the industrial contracts there appears the words "including Buyer" at the end of the paragraph.) (Exhibit 59, Curtailment Proceeding).

The above Impairment of Delivery provision is substantially identical to the United Tariff on file with the FPC prior to United's attempt to curtail by filing a revised tariff in the Curtailment Proceeding.

Accordingly, it becomes obvious, when armed with the facts, that all of United's industrial customers are bound by a system of priorities that constitutes a voluntary contractual curtailment program. Plainly, then, any curtailment program fashioned by the FPC for United would, as a matter of contract (not regulation), directly affect all of the industrial customers except the six utility customers who contractually (and with the FPC imprimatur)[7] have prio-

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[7]United's filed tariff and the initial certificate issued by FPC approving direct sale contracts.

rity. It necessarily follows that the immense statistics used by FPC in drawing its picture of crisis are not real because they proceed on the false premise that *all* of the direct sale customers would be unaffected by curtailment when in fact only six utility power plant customers with nine contracts would not be affected.

Although the maps the FPC uses as Appendices "H" and "I" are not a part of any record at issue here, they are meaningless in that (1) the suggested crisis was in fact triggered by the FPC in requiring all pipeline companies to file curtailment programs whether they contemplated shortages or not (FPC Order No. 431, issued April 15, 1971) and (3) for the reasons described above with respect to United's direct sale contracts.

One final observation before we leave this question of importance to the administration of the Act: The FPC has attempted to bludgeon every Court involved in this litigation with expressions of anguish about the plight of so-called "human needs" customers, and their need for protection by the FPC. (Petition, pp. 13, 15) It is too obvious to belabor that those same hospitals and schools mentioned by FPC obtain their power from LP&L. Equally obvious is the "human need" for electricity to keep an iron lung operating or an air conditioner for a school room when it is 95° F. Fortunately, Congress has exercised the wisdom of leaving to the States the decision on use of energy in their localities.

This is not a "human needs" issue. It is an issue of money. United in utmost bad faith took on new customers after it first recognized in May 1968 that its reserves were decreasing. Appendix "M" to this brief is United Exhibit 45 in the Curtailment Proceeding showing the new and additional service initiated from May 1968 to October 31, 1969, the total peak amount being 209,119 Mcf and further new service after November 1, 1969, being a total peak amount of 914,966 Mcf. Thus after May 1968, United took on business of the total magnitude of 1,124,075 Mcf

per day. That is far more gas than all of the dire shortage estimated by speculation at p. 15 of the FPC petition.[8] Of course, that gas to new customers is being sold by United at substantially higher prices than the price obtained from existing customers. Thus, the efforts by FPC in this litigation address themselves principally, if not entirely, to giving economic assistance to United at the expense of United's existing exempt direct sale industrial customers. In Commissioner Carver's eloquent words, the FPC's jurisdiction is being used "as a shield against contracts which once appeared provident but now seem otherwise." (Appendix "K" hereto, p. 2)

Any suggestion by FPC that United's "Green System," found by the Court of Appeals to be intrastate, can have any national importance is solemn nonsense.[9] As the Court of Appeals pointed out, there are no esoteric problems involved in that issue, and no important questions with respect to contract language in an effort to cloak transactions as in *People v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486 (1965), but simply a set of physical facts establishing the mechanics of "the channel of constant flow." The Court of Appeals found the intrastate nature of that channel of flow was established by "uncontradicted evidence." The FPC was a full participant in the making of that record. There is no better basis here for certiorari than there was in the Florida Parishes Case.[10]

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[8] Those figures include pipeline customers of United, all of whom have other sources of gas supply.

[9] The local nature of the Green System is evident upon looking at the map attached hereto as Appendix "N". (Extract of LP&L-Belvin Ex. 2 in Injunction Proceeding)

[10] *Louisiana Public Service Commission v. FPC*, 359 F.2d 525, cert. den., 385 U.S. 833

B. THE DECISION BELOW DOES NOT CONFLICT IN PRINCIPLE WITH PRIOR DECISIONS OF THIS COURT

The only cases of this Court mentioned by FPC as conflicting in principle with the decision below are *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 68 S.Ct. 190 (1947), and *Federal Power Commission v. Transcontinental Gas Corp.*, 365 U.S. 1, 81 S.Ct. 435 (1960). Those are precisely the cases used by the Court of Appeals as guides to its determination of whether direct industrial sales can be curtailed by FPC. (Appendix "A", pp. 13a-19a) The interpretation by the Fifth Circuit of those cases is the same as has been consistently made by other circuits. *Granite City Steel Company v. Federal Power Commission*, 320 F.2d 711 (D.C. Cir., 1963); *City of Hastings v. Federal Power Commission*, 221 F.2d 31 (D.C. Cir., 1954); *Colorado Interstate Gas Co. v. Federal Power Commission*, 185 F.2d 357 (3d Cir. 1950); *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 359 F.2d 675 (8th Cir. 1956). We submit that this Court's interpretation of the Natural Gas Act in *Panhandle Eastern* and *Transcontinental*, and the interpretation of those decisions by the several circuits, are obviously of more weight and substance than the strained suggestions by FPC herein.[11] The illogic of FPC's suggestion is that it would require a complete elimination of part of the Act. FPC says (at p. 16):

> "Thus, while the application of the Act to sales is limited to sales of interstate natural gas for re-

[11] Even the FPC does not believe what it is now suggesting. The knowledgeable former Chairman, Mr. Joseph C. Swidler, stated forthrightly to Congress in June 1963 that, "The price *and other terms* of a direct sale by a pipeline to an industrial consumer are outside the sphere of this Commission's regulatory authority." (Appendix "O" hereto) Also, in FPC Annual Report of 1970, at p. 8, there is the continuing admission of non-jurisdiction in a request by FPC that it be given jurisdiction of "load curtailment and allocation of gas by any gas company, whether or not it is otherwise subject to the Commission's jurisdiction."

> sale, the Act applies without limitation to the transportation of all gas in interstate commerce and to natural gas companies engaged in such transportation."

For that interpretation to be correct, the only sales of natural gas that would be exempt from the Act would be those made, delivered and consummated wholly in one state. Such an interpretation would compel the interpreter to read out of the Act the specific exemption of direct industrial sales regardless of their interstate nature.

Equally defective is FPC's contention regarding the applicability of Sections 4 and 5 of the Act. FPC overlooks the limiting phrase, "subject to the jurisdiction of the Commission," in Sections 4 and 5. The absence of that limitation in Section 7(e) is the underlying basis for this Court giving the FPC initial ("veto") certificate authority in *Transcontinental*, supra.

Finally, we note FPC's Footnote 8 citation of *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266 (1950). No contention has been made by LP&L that United is not a "natural gas company" and subject to FPC accounting and reporting authority. Indeed, LP&L has not at any stage of this litigation attempted to attack collaterally (as erroneously charged by FPC) or directly, the curtailment proceedings of the FPC. LP&L concedes that FPC has authority over United to formulate a curtailment program affecting all of United's jurisdictional customers. Thus, LP&L's suit named only United and its parent, Pennzoil, and not the FPC, and LP&L sought injunctive relief only against United's breaches of contract, not against the FPC conducting any proceeding within its authority.

OPPOSITION TO WRIT IN THE CURTAILMENT PROCEEDING

The FPC suggests that this Court should issue a writ of certiorari in the Curtailment Proceeding, although that proceeding is pending review before the Fifth Circuit and is still in the custody of the FPC on a remand to a Hearing Examiner. With a candor not shown elsewhere in its petition, the FPC recognizes (p. 21) that it is on infirm ground. We submit, in accord with FPC's expressed concern, that this Court would be exercising an original jurisdiction contrary to Article III, Section 2, of the U. S. Constitution, if it issued a writ under these circumstances. Stern and Gressman, *Supreme Court Practice*, pp. 28-30 (4th Ed., 1969); Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 132, 164 (Fn. 6); *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U.S. 572, 576, 50 S.Ct. 419 (1930)

CONCLUSION

For the foregoing reasons, the petition for writs of certiorari in both the Injunction Proceeding and the Curtailment Proceeding should be denied. Moreover, because of the burden upon LP&L and all others similarly situated of being now curtailed by United pursuant to unauthorized orders of the FPC, LP&L has formulated this Brief in Opposition with considerable speed so that this urgent request could be made that this Court expedite action on the petition for writs, and, indeed, forthwith deny same.

* * * * *

RESPONSE TO MOTION FOR EXPEDITION

If the Court were to decide to issue a writ or writs herein, then LP&L would join in requesting all possible expedition for the same reasons immediately above stated.

Respectfully submitted,

THEUS, GRISHAM, DAVIS & LEIGH
THOMAS W. LEIGH
Monroe, Louisiana

MONROE & LEMANN
ANDREW P. CARTER
DAVID E. WALKER

By Andrew P. Carter
1424 Whitney Building
New Orleans, La. 70130
COUNSEL FOR RESPONDENT

February 14, 1972

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 1972, three copies of the foregoing Response to Motion for Expedited Consideration and Brief in Opposition to Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed from Washington, D. C., postage prepaid, to:

William C. Harvin, Esq.
3000 One Shell Plaza
Houston, Texas 77002

Erwin N. Griswold, Esq.
Solicitor General
Department of Justice
Washington, D. C. 20530

Gordon Gooch, Esq.
General Counsel
Federal Power Commission
Washington, D. C. 20426

I further certify that all other parties required to be served are being served on Wednesday, February 16, 1972, due to the unavailability of facilities for service in New Orleans, Louisiana on February 15, 1972, that being an official holiday known as Mardi Gras.

ANDREW P. CARTER
1424 Whitney Building
New Orleans, Louisiana 70130

Counsel for Respondent

COMPLAINT

Now comes Louisiana Power & Light Company (LP&L) for its complaint against the defendants, United Gas Pipe Line Company (United), and Pennzoil United, Inc. (Pennzoil), respectfully alleges:

THE PARTIES

1. Plaintiff, Louisiana Power & Light Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Florida, and having its principal place of business in the State of Louisiana. LP&L is engaged in the generation, transmission, distribution, and sale of electric power and energy throughout 46 of the 64 Parishes in the State of Louisiana, including Ouachita Parish. LP&L operates electric generating plants known as "Sterlington Station" in the Parish of Ouachita near the community of Sterlington, and as "Nine Mile Point Station" in Jefferson Parish, Louisiana.

2. Defendants, United and Pennzoil, are corporations, duly organized and existing under and by virtue of the laws of the State of Delaware, and having their principal places of business in the State of Texas. United is engaged in the transmission of natural gas through transmission lines located in the States of Louisiana, Texas, Mississippi and northward and eastward into the midwest and eastern part of the United States. United has been furnishing natural gas to LP&L at both the Nine Mile Point Station and the Sterlington Station for many years under contract. United is a wholly owned subsidiary of Pennzoil.

JURISDICTION

3. It has become necessary for LP&L to bring this action for an injunction and for damages because of the continuing and anticipated breach of contract in the furnishing of natural gas by United directly, and in coordination with and

under the inducement, direction and control of Pennzoil. This Court has jurisdiction under 28 U.S.C. § 1332 because this is a civil action in which the matter in controversy exceeds the sum or value of $10,000 and is between citizens of different states.

THE CONTROVERSY

4. The Sterlington Station consists of four electric generating units of varying sizes, the smallest being of a capacity of 32,000 kilowatts and the largest 224,000 kilowatts. When these units were constructed between the years 1928 and 1958, the supply of natural gas in North Louisiana was sufficiently abundant so as to obviate any contemplation of securing an alternate source of fuel other than natural gas. The Nine Mile Point Station consists of four electric generating units of varying sizes, the smallest being of a capacity of 74,000 kilowatts and the largest 750,000 kilowatts. There are no alternate sources of fuel at the Nine Mile Point Station except for emergencies of not more than 3 days.

5. LP&L has entered into several contracts with United for the supply of natural gas to the Sterlington Station. Those contracts are as follows:

(a) An Agreement dated February 20, 1956, for a term of 20 years, which contract set a maximum daily delivery obligation of not in excess of 25,000 mcf of gas, and which contract contains no hourly limitations. Copy of which contract is annexed hereto as Exhibit "A." That contract further contains an Article IX, entitled "Impairment of Deliveries," which article reads as follows:

> "In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers first be supplied by Seller, and the remaining avail-

able gas shall be prorated by Seller among its other consumers."

This said 1956 Agreement was amended on March 29, 1963 and on November 30, 1966, the only amendment relevant to this complaint being the increase in maximum daily delivery obligation from 50,000 mcf up to 55,000 mcf. Then, on December 2, 1969, LP&L and United entered into a further amendments of the 1956 Agreement. The only change wrought by the 1969 amendment relevant to this dispute was the decrease in the maximum daily delivery obligation from 55,000 mcf down to 30,000 mcf during the calendar year 1970. No hourly maximum limitations were stipulated in any of the amendatory agreements of 1963, 1966 and 1969. On August 10, 1970, LP&L agreed to a further amendment setting the daily maximum at 25,000 mcf, effective January 1, 1971.

(b) On December 2, 1969, LP&L and United entered into a Transportation Agreement whereby United agreed to transport for LP&L gas received by United from the Antioch Field for the benefit of LP&L, said gas to be delivered to LP&L at the Sterlington Station through the same meter and intermingled with the gas delivered by United under its 1956 base Agreement with LP&L. The said Transportation Agreement contains no hourly maximum restrictions. Copy of said Agreement is annexed hereto as Exhibit "B."

(c) On May 5, 1967, LP&L and United entered into a "Standby Gas Sales Agreement," which agreement was amended as of December 2, 1969, and which agreement, as amended, provides for no guaranteed deliveries of gas, but for the sale of such gas as United may, in its sole discretion, have available for sale. Copy of said Agreement is annexed hereto as Exhibit "C."

6. LP&L has entered into a contract with United for the supply of natural gas to the Nine Mile Point Station. This contract is as follows:

(a) An Agreement dated May 6, 1968 for a term of 25 years which contract set a maximum daily delivery obligation of not in excess of 80,000 mcf. That contract further contains an Article IX entitled "Impairment of Deliveries," which article reads as follows:

> "Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied [illegible] if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers."

A copy of said Agreement is annexed hereto as Exhibit "D."

7. United filed an application with the Federal Power Commission (FPC) on October 26, 1970, proposing a curtailment program for most if not all of its customers for the so-called "winter months," i.e., from November 1, 1970 through March 31, 1971. Those being months when the demands for energy in LP&L's system are at low ebb, LP&L joined with most if not all of United's customers in amicably agreeing upon such curtailment program, the effect of which was nil upon LP&L's system capabilities.

8. However, United has now filed a supplemental application with the FPC by which it proposes a further curtailment program, this proposal covering the so-called "summer months," i.e., from April 1, 1971 to October 31, 1971.

9. This said curtailment program proposal by United to commence on April 1, 1971 will affect LP&L's Sterlington and Nine Mile Point Stations by reason of a reduction in gas supplied by United, all in violation of United's delivery obligations and not in accordance with the contract articles on "Impairment of Delivery" quoted hereinabove in paragraphs 5 and 6, and in violation of the provisions of its General Gas Tariff Article 12,1, as amended subsequent to the execution of said contracts.

10. United has further advised LP&L that the said proposed curtailment plan, effective April 1, 1971, will result in the curtailment of deliveries of natural gas to Nine Mile Point from the daily maximum agreed upon in the aforesaid contract of 80,000 mcf to an amount between 66,847 mcf and 35,300 mcf, and at Sterlington from the daily maximum agreed upon of 25,000 mcf to between 24,330 and some lesser amount, the exact amount of said curtailments to depend upon the extent of an alleged shortage in the supply of natural gas in the Pennzoil and United system.

11. The curtailment program proposed by United, as described by United, contemplates the curtailing of industrial users, including gas used to generate electricity which in turn is supplied to industrial users; then, after all such customers have been curtailed and if there remains an alleged shortage in the United and Pennzoil system, United contemplates curtailing gas used to generate electricity consumed by domestic consumers, and after curtailing all power stations, if there remains an alleged shortage, only then would it curtail gas used domestically. (Said program is set forth and attached as Exhibits "E" and "F".)

12. The curtailment program advanced by United described above is in contradiction and defeat of LP&L's rights under its contracts with United. The article on "Impairment of Deliveries" in the Sterlington contract quoted hereinabove provides that LP&L stands first, along with gas utilities selling gas to domestic consumers, in the event of a shortage of gas. Under the contract, only after

the public utility power plants and the gas utilities obtained their full gas requirements would there then be gas supplied by United to the consumers, and that supply would be made ratably.

The Nine Mile Point contract "Impairment of Deliveries" provision quoted hereinabove provides that the order of priority in the event of a shortage calls for the gas utilities to be fully supplied first, then the public utility power plants to be fully supplied second; and if there is not enough gas for all of the power plants, then they are to be supplied ratably. Then, thirdly would come the other consumers, and they would be supplied ratably by United. United's curtailment program constitutes and contemplates a significant change, if indeed not a reversal, of priorities of curtailment. United contemplates curtailing industrial users first, including gas used to generate electricity which in turn is supplied to industrial users; then, if there were still a shortage, United contemplates curtailing gas used to generate electricity which is consumed by domestic consumers. After that curtailment, if there were still a shortage, only then would United curtail gas used by domestic consumers. Additionally, there is no indication of what curtailments United proposes with respect to its own industrial or commercial consumers or, indeed, with any of its other customers of any kind.

13. United has represented to LP&L that the interruptions and curtailments of delivery of natural gas to Sterlington and Nine Mile Point were necessary and will be necessary in order for United to have on the days of proposed interruption and curtailment sufficient gas to supply the needs of its domestic consumers on such days. LP&L has recently been informed by United that said proposed interruptions and curtailments will not be necessary to supply the needs of domestic consumers on the days of such interruptions and curtailments due to any alleged shortage of natural gas on such days in the United and Pennzoil system, but that such interruptions and curtailments will be for the purpose of filling United's large industrial customers, some of whom are new customers who

have contracted with United for purchase of gas within the last two or three years when United knew it might be faced with a shortage of natural gas.

14. Such proposed curtailments of deliveries of natural gas by United to the Nine Mile Point and Sterlington power plants of LP&L constitute breaches, as alleged above, of the obligations of United under its gas supply contracts with LP&L described hereinabove, and, unless restrained by this Court, United will breach its obligations under such contracts by the proposed additional curtailment program to be instituted by it on April 1, 1971. Similarly, unless restrained by this Court, United's parent company, Pennzoil, will induce, direct and control such breaches of contract.

NECESSITY FOR INJUNCTIVE RELIEF

15. LP&L will suffer immediate and irreparable damage if United is not restrained from breaching and Pennzoil restrained from inducing the breach of United's contracts to sell and deliver to LP&L the volumes of natural gas that United agreed to sell and deliver in the contracts referred to hereinabove.

16. LP&L has throughout its system serving 46 of 64 Parishes in Louisiana a total of some 340,000 customers, among whom are numbered some of the largest chemical and petro-chemical plants and oil refining and gas processing installations in the entire United States. The generating and transmission system of LP&L is interconnected with the systems of Central Louisiana Electric Company, Gulf States Utilities Company, Southwestern Electric Power Company, and New Orleans Public Service, Inc., being all of the other electric utility companies in the State of Louisiana. LP&L also is the supplier of electricity to nine of the thirteen rural electric cooperatives in Louisiana, which cooperatives furnish electric service to some 105,000 consumers throughout the State of Louisiana. LP&L also furnishes electricity by wholesale contract, and by standby and/or emergency agreements to nine municipalities in Louisiana, said munici-

palities furnishing electric service to some 139,000 consumers. Further, the system of LP&L is interconnected to the systems of Arkansas Power & Light Company, Mississippi Power & Light Company and Mississippi Power Company, and also participates in an electric transmission grid network known as "South Central Electric Companies" consisting of eleven large electric utility companies in the South Central area of the United States furnishing electricity to consumers on the order of 2,870,000, and which network is further interconnected with a power pool that interties the entire electric system of the United State east of the Rocky Mountains with the exception of part of the State of Texas.

17. The curtailment in the quantity of gas furnished by United during peak periods as described hereinabove to LP&L's Nine Mile Point and Sterlington Stations prevents Louisiana Power & Light Company from utilizing the full generating capability of these power stations, resulting in inability to meet the demands upon said stations, the ultimate effect of which can be a "blackout" or "brownout." In an interconnected transmission grid network such as described above there is an element of interdependence of such nature as exposes the members of such network to a "domino effect" in the event of a blackout at one of the generating stations. Thus, such a blackout or brownout, depending upon the circumstances at the time, such as weather, peak demands, equipment failures, acts of God, and the like, could extend and expand such blackout to cover an area as large as the whole State of Louisiana or, indeed, a several-State area such as occurred during the notorious "Northeast Blackout" in 1965. A blackout of any magnitude would constitute irreparable injury, and would cause damage to LP&L beyond any means of calculation, but would, if only in the slightest degree be of a magnitude amounting to millions of dollars.

18. Apart from the irreparable injury that may be suffered by LP&L as described above, if the unwarranted breach of contract by United is permitted LP&L will suffer, until

United is enjoined, a present and continuing kind of irreparable injury. Because of LP&L's reliance upon United honoring its contract to furnish gas to Sterlington, LP&L constructed the Sterlington Station without any provisions for the use of an alternative source of energy, oil or other fossil fuel. There is no alternative source of natural gas available to LP&L for the Sterlington Station to utilize the full capacity of the Sterlington Station. Accordingly, the abovesaid curtailment in the supply of gas by United causes an additional irreparable injury to LP&L through the inability by LP&L to fully utilize the generating capability of the Sterlington Station, the loss of which capability is on the order of 60,000 kilowatts, which loss will continue to be suffered so long as United curtails the supply of gas. This loss is irreparable since electricity is a product which cannot be stored and which can be used only when there is demand therefor, and which must be supplied when the demand exists or not at all, and there is no remedy at law for this loss. Further, this loss is irreparable since it consists of a loss of use of money invested in these facilities which is incalculable, but which is substantial in view of the investment in Sterlington Station being on the order of $30,010,000.00, and at Nine Mile Point, Station about $84,000,000.00, and there is no remedy at law for this loss.

PRAYER

Accordingly, LP&L invokes the provisions of 28 U.S.C. § 1332 as well as this Court's general equity jurisdiction and respectfully requests that the Court:

(a) Issue its temporary restraining order as provided by Rule 65(b) of the Federal Rules of Civil Procedure restraining and enjoining Pennzoil and United from curtailing the supply of gas to the Sterlington and Nine Mile Point generating stations of LP&L in breach of its contracts with LP&L pending a hearing on LP&L's application for preliminary injunction and ordering said companies panies to deliver natural gas to LP&L in accordance with the provisions of said contracts;

(b) Issue a preliminary injunction in accordance with Rule 65 of the Federal Rules of Civil Procedure restraining and enjoining United and Pennzoil from curtailing the supply of gas to the Sterlington and Nine Mile point generating stations of LP&L in breach of its contracts with LP&L pending a hearing on LP&L's application for permanent injunction, and ordering said companies to deliver natural gas to LP&L in accordance with the provisions of said contracts;

(c) Issue its permanent injunction restraining and enjoining United and Pennzoil from curtailing the supply of gas to the Sterlington and Nine Mile Point generating stations of LP&L in breach of its contract with LP&L, and ordering said companies to deliver natural gas to LP&L in accordance with the provisions of said contracts;

(d) Grant such other and further relief at law or in equity as the Court may deem just and proper.

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VERIFICATION

STATE OF LOUISIANA
PARISH OF ORLEANS

H. L. Deloney, being duly sworn deposes and says that he is a Vice President of Louisiana Power & Light Company, plaintiff herein, and that he has read the foregoing complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes then to be true.

H.L. Deloney, Vice President

Sworn to and subscribed
before me this __ day
of March, 1971.

NOTARY PUBLIC

APPENDIX K

United Gas Pipe Line Company Docket No. CP71-89

[Issued February 9, 1972]

CARVER, Commissioner, *dissenting*:

I dissent from so much of this opinion as relates to the New Orleans District (or Green System-East) portion of United's facilities in the State of Louisiana.

To understate the matter considerably, this is a most unusual case. The applicant is a major pipeline company, long recognized as a "natural gas company" for the purposes of regulation under the Natural Gas Act, and a party to numerous, probably hundreds, of proceedings before this Commission. For more tha a decade, however, it has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit free of Federal regulatory impact and free to contract in any manner it chose, consistent with State law.

Suddenly, in late 1970, United finds virtue in the privilege of being regulated and seeks to invoke our jurisdiction through this application. Why? United says *Florida Parishes* requires such action. I disagree, but even if that were the case, Florida Parishes was finally concluded in 1966, and four years is a long time for error to surface in this fashion. Another explanation, less admirable but more plausible, lies in a combination of factual coincidences. United's Green System-East serves a heavy industrial load under long-term contracts reflecting the favorable rates that prevailed when gas supplies were plentiful and pipeline capacity needed

markets.[1] But between 1962 and 1970, the ratio of reserves to production for the supplies the Green System could rely upon dropped from an ample 30:1 to a dangerously low 4.6:1. Stated otherwise, at 1970 levels of delivery, United's available reserves could meet its customers' needs for less than five years. Hardly surprising, then, is the fact that within the same month that this application was filed, United also sought (and ultimately received) the assurance of this Commission that implementation of an approved curtailment plan "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts." *United Gas Pipe Line Company*, ___ FPC ___ (Opinion No. 606, October 5, 1971).

I did not participate in the above proceeding, but dissented to its reaffirmation on rehearing (Opinion No. 606-A, December 3, 1971), both generally and with specific reference to the above-quoted holding.[2] My reservations were well-founded, as evidenced by the present efforts to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands. The majority opinion concedes as much (see par. 51, *supra*).

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[1] Based on data in United's 1970 Annual Report and Exhibit 34 of the record, direct industrial sales represent nearly 68% of the volumes delivered by the New Orleans District (138.4 out of 203.7 million Mcf).

[2] The powers of this Commission are parallel in all essential respects to those conferred upon the FCC by the Communications Act of 1934 (47 U.S.C. 301ff), as to which the Supreme Court has said: ". . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." *Regents of the University System of Georgia v. Carroll, et al.* (1950) 338 U.S. 586, 600-602.

The preceding observations are merely descriptive of the general setting and the dominant motivations that surround the proceeding. It is necessary to state them here because they are not otherwise exposed to public view. They explain in considerable part my refusal to join in what the Commission does today, but they are buttressed by a broad array of more specific objections I have to the majority opinion. Ordinarily, I should feel compelled to document those legal, policy, and procedural differences in the detail they merit. I refrain from doing so, however, because the issues involved have passed from this arena. What is done here is a useless thing and one that portends difficulty for this Commission in the future.

While this proceeding was pending, some of the parties engaged in a race to the courthouse with this Commission in hot pursuit. *Louisiana Power and Light v. United Gas Pipe Line Company*, cited par. 75, majority opinion *supra*, constitutes a full adjudication by a court of competent jurisdiction of the very issues here considered. Until that judgment is vacated through available appellate resort, this Commission is without authority to issue any valid directive inconsistent therewith.

Whether we denominate the principle involved as *res judicata*, estoppel by judgment, or some other term, every lesson of the law tells us that we are bound by the opinion of the Fifth Circuit Court of Appeals unless and until its judgment is vacated through proper judicial process. The conditions for application of that principle could not be more clearly present: The issues are identical; the essential parties are the same. This proceeding merely renews a duel that has already been "fought out . . . in litigation with the other party." *Commission v. Sunnen*, 333 U.S. 598 (1948). (This case is not the same as *FPC v. Amerada Petroleum Corp., et al.*, 379 U.S. 687 (1965), because it was there admitted by the court below that a new claim was being litigated in the second action. By contrast, the order being issued here is in head-on collision with the Fifth Circuit's holding on the status of United's Green System-East.)

This conclusion is the more compelling because of the special facts surrounding the earlier judicial proceeding. As the majority account amply discloses, this Commission was not an original party thereto, but chose voluntarily to intervene for the purpose of arguing its primary jurisdiction.[3] Knowingly and purposefully, it submitted to the jurisdiction of the courts which have so far considered the matter. "An administrative body which submits a legal question to a court of competent jurisdiction is bound by its judgment." *Otis & Co. v. SEC*, 176 F.2d 34 (CADC, 1948) (holding as summarized in Headnote 4), and may be enjoined from undertaking a subsequent proceeding to relitigate the same controversy. An attack on a prior judgment will also be rejected, "even though it was based on a patently erroneous view of the law." *In re Federal Water and Gas Corp.*, 188 F.2d 100, 105 (CA 3, 1951), cert. den. *sub. nom. Chenery Corp. et al. v. SEC*, 341 U.S. 953 (1951).

Res judicata concepts are controlling as to jurisdictional questions as well as factual matters bearing on the merits, *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938) and enforces repose "not only as respects matters actually presented . . . in the original proceeding, but also as respects any other available matters which might have been presented to that end" (Citations omitted), *Chicot County Drainage District v. Baxter State Bank, et al.*, 308 U.S. 371, 378 (1940).

Administrative proceedings are subject to the same principles as judicial bodies in this respect, and there is no doubt

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[3] In this respect, the majority opinion fails to make the proper distinction between the parallel and equal doctrines of primary jurisdiction on the one hand and *res judicata* on the other (par. 83). Primary jurisdiction does not constitute an *ouster of power* to hear a case; it merely provides a working formula to establish *priority of consideration* where substantive issues in the proceeding are within the expert competence of the agency. *Res judicata* is an effective bar to rehearing of an issue already litigated. As presented here, the ultimate distinction is between an alleged *collateral* attack upon administrative jurisdiction and a *direct* attack upon a judgment already rendered.

but what the courts would have protected our process had the issues herein been decided initially by this Commission and allowed to become final. *U.S. v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966); nor will the state courts be permitted to retry issues previously determined by the Commission acting within its proper scope of authority. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 339 (1958).

This is a sword that must be allowed to cut both ways if administrative and judicial authority are to respond in the complementary and concurrent manner that our complex society requires. By our intervention in a private law suit, we have already lent the weight of sovereign Federal authority to one side of the balance. Having failed to carry that forum, it is proposed to flout the court's mandate, an action which is as fruitless as it is irresponsible.

John A. Carver, Jr.,
Commissioner

APPENDIX L

FPC Docket No. RP71-29
Witness: John B. Clopton
Exhibit No. 22 (JBC-2)

UNITED GAS PIPE LINE COMPANY

List of Industrial, City Gate, and Pipeline Contracts
Between United and Various Customers

Allied Paper Incorporated
Aluminum Company of America
American Cyanamid Company
Atlas Processing Company
Boise Southern Company
Cities Service Oil Company
Coastal Chemical Corporation
*Clarke-Mobile Counties Gas District
**Colonial Pipeline Company
Container Corporation of America
Continental Can Company, Inc.
Courtaulds North America Inc.
Escambia Chemical Corporation
Georgia-Pacific Corporation
Gulf States Utilities Company
Ideal Cement Company
Division of Ideal Basic Industries, Inc.
International Paper Company – Mobile, Alabama
International Paper Company – Moss Point, Mississippi
International Paper Company – Springhill, Louisiana
International Paper Company – Warren County, Mississippi
Jefferson Lake Sulphur Company
*Louisiana Gas Service Company
Louisiana Power & Light Company – Ninemile Point Plant
Louisiana Power & Light Company – Sterlington, Louisiana
Marquette Cement Manufacturing Company
Masonite Corporation
Mississippi Power Company – Plant Sweatt
Mississippi Power Company – Plant Jack Watson

*City Gate Resale Customers
**Pipeline Resale Customers

Mississippi Power Company – Plant Eaton
Mississippi Power & Light Company
**Mississippi River Transmission Corporation
*Mobile Gas Service Corporation
Monsanto Company
National Gypsum Company
**Natural Gas Pipeline Company of America
*New Orleans Public Service Inc.
Olinkraft, Inc.
Porter, H. K., Company, Inc.
Scott Paper Company
Shell Oil Company
South Mississippi Electric Power Association
**Southern Natural Gas Company – Monroe, Louisiana
**Southern Natural Gas Company – Kosciusko, Mississippi
Southland Paper Mills, Inc.
Southwest Potash Corporation,
a Subsidiary of American Metal Climax, Inc.
Stauffer Chemical Company
St. Regis Paper Company – Escambia County, Florida
St. Regis Paper Company – Wanilla,
Lawrence County, Mississippi
Tenneco Chemicals, Inc. Newport Division
**Texas Eastern Transmission Corporation – Longview &
West Monroe
**Texas Eastern Transmission Corporation – Kosciusko,
Mississippi
**Texas Gas Transmission Corporation
Texas Gulf Sulphur Company
*United Gas, Inc.
Willmut Gas & Oil Company

APPENDIX M

Docket No. RP71-29
Exhibit No. 4-5

UNITED GAS PIPE LINE COMPANY

New and Additional Firm Service:

	Page
Initiated After November 1, 1969	1
Initiated Between May 1968 and October 31, 1969	2

UNITED GAS PIPE LINE COMPANY

New and Additional Firm Service Initiated Between May 1968 and October 31, 1969

(Mcf at 14.73 psia)

Customer	Location	Docket No.	Date of Certificate Order	Date Service Commenced	Volume in Mcf Peak Day	Volume in Mcf Annual
Courtalds North America, Inc.	Salco, Ala.	G-13142		6-1-69 1/	4,000	438,000
Cities Service Oil Co.	Lake Charles, La.			2-1-69 1/	15,000	5,475,000 2/ 4/
Mississippi Power Co.	Gulfport, Miss.			3-1-69 1/	16,000	4,088,000
Texas Gas Transmission Corporation	Monroe, La.	CP68-14	3-11-68	11-1-68	100,000	36,500,000 2/
City of Gary, Texas	Panola County, Tex.	CP68-152	1-23-68	12-1-68	1,650	91,500 4/
Mississippi River Transmission Corp.	Monroe Field, La.	CP68-22[illegible]	Final Order 4-24-69	10-21-68 1/	50,000	18,250,000 2/
Bay Prairie Aggregate Corp.	Wharton County, Tex.	CP68-277	6-4-68	9-17-68	7,500	2,100,000 5/
Southland Oil Co.	Jasper County, Miss.	CP68-277	6-4-68	9-17-68	2,000	547,500
Humble Oil & Refining Co.	Iberia Parish, La.	CP68-300	6-26-68	7-1-68	3,500	525,000
City of Naklaw, Texas		CP69-[illegible]	7-22-69	10-6-69	1,425	102,900
Budget application		CP69-38	10-21-68		8,044	358,769
Total between May 1968 and October 31, 1969					209,119	68,476,669

1/ Temporary authorization granted to begin deliveries.
2/ Based on 100% Load Factor.
3/ Effective date as shown on Ex. 15, page 4.
4/ Third year estimate.
5/ Fifth year estimate.
6/ Contract expires 9-1-72.

2m.

Docket No. RP71-29
Exhibit No. 2
Page 2 of 2

UNITED GAS PIPE LINE COMPANY

New and Additional Firm Service Initiated After November 1, 1969

(Mcf at 14.73 psia)

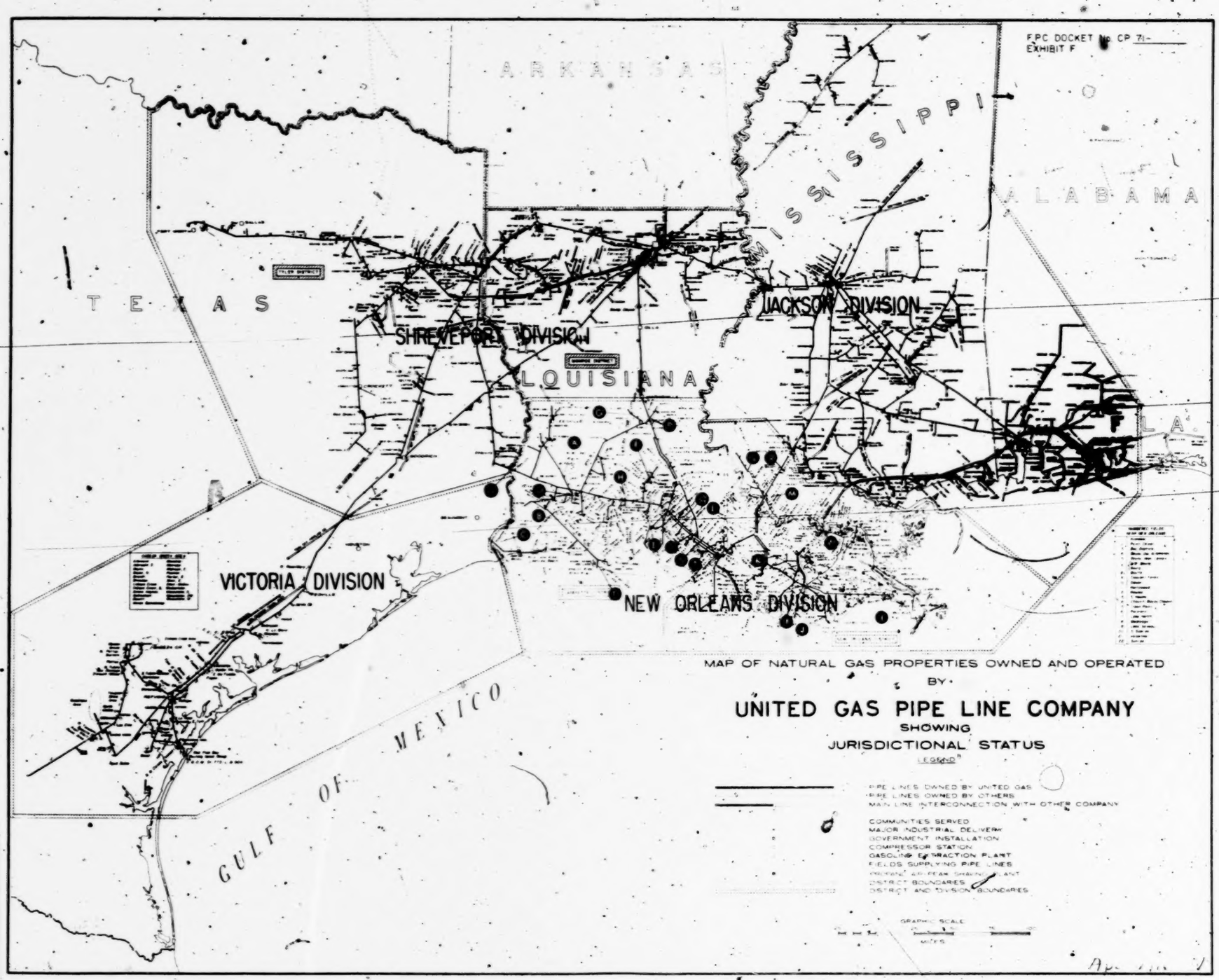
Customer	Location	Docket No.	Date of Certificate Order	Date Service Commenced	Volume in Mcf Peak Day	Volume in Mcf Annual
Texas Gas Transmission Corporation	Monroe, La.	CP68-14	3-11-68	11-1-69	50,000	18,250,000 1/
" " " "	" "	"	"	11-1-70	50,000	18,250,000 1/
Stauffer Chemical Co.	LeMoyne, Ala.	G-13142		1-1-70	1,300	474,500 2/
Mid-Louisiana Gas Co.	Fowler, La. or Baton Rouge, La.	CP69-341	9-17-69 Amended 11-18-70	11-2-70	40,000	6,040,000 3/
Budget application		CP70-43	8-25-69		4,589	277,255
Georgia-Pacific Corp.	Taylorville, Miss.	CP70-44	10-14-69	5-14-70	2,400 4/	420,000
Gulf Power Co. - Crist Plant 4/	Near Pensacola, Fla.	CP70-109	2-17-70	5-4-70	84,000 5/	17,875,000
City of Chireno, Texas	Chireno, Texas	CP68-159	4-18-68	4-23-70	3,500	221,750
Existing Distribution Companies & Direct Industrials	Shreveport, La. & Jackson, Miss. Divisions	CP70-148	5-5-70	1/	497,557 3/	22,884,010
Mid-Louisiana Gas Co.	So. Louisiana	CP71-141	1-4-71		40,000 4/	14,600,000 4/
Georgia-Pacific Corp.	Goss, Miss.	CP70-169	4-13-70	5-5-70	500	180,000
Louisiana Plywood Corp.	Wyatt, La.	CP70-223	6-22-70	8-22-70	680	170,000
Mississippi River Transmission Corp.	Near Monroe, La.	CP70-278	8-28-70	11-3-70	51,721	18,878,165
Escambia Chemical Corp.		CP70-297	8-28-70		12,000 6/	3,066,000
Budget application		CP71-34	11-4-70		2/	2/
Total after November 1, 1969 (Total page 1)					705,847	106,986,780
Total after May 1968 (Total pages 1 and 2)					914,966	175,463,449

1/ Not furnished in record--construction commenced 5-11-70.
2/ Not available.
3/ Represents increase in market requirements for the Shreveport and Jackson Areas between 1968 and 1971 less duplications.
4/ March 1 through October 31 for years 1970 and 1971 only.
5/ 40,000 Mcf per day for 151 days. (Periods 11-1-69 to 3-31-70 & 11-1-70 to 3-31-71.)
6/ Only 6,000 Mcf included in totals.
7/ Based on 100% Load Factor.
8/ Not included in totals.

Docket No. RP71-29
Exhibit No. ___
Page 1 of 1

3m

1n



FPC DOCKET No. CP 71-
EXHIBIT F
ARKANSAS
MISSISSIPPI
ALABAMA
TEXAS
LOUISIANA
FLA.
SHREVEPORT DIVISION
JACKSON DIVISION
VICTORIA DIVISION
NEW ORLEANS DIVISION
GULF OF MEXICO
MAP OF NATURAL GAS PROPERTIES OWNED AND OPERATED
BY
UNITED GAS PIPE LINE COMPANY
SHOWING
JURISDICTIONAL STATUS
LEGEND
PIPE LINES OWNED BY UNITED GAS
PIPE LINES OWNED BY OTHERS
MAIN LINE INTERCONNECTION WITH OTHER COMPANY
COMMUNITIES SERVED
MAJOR INDUSTRIAL DELIVERY
GOVERNMENT INSTALLATION
COMPRESSOR STATION
GASOLINE EXTRACTION PLANT
FIELDS SUPPLYING PIPE LINES
PROPANE AIR-PEAK SHAVING PLANT
DISTRICT BOUNDARIES
DISTRICT AND DIVISION BOUNDARIES
GRAPHIC SCALE
MILES

JURISDICTION OF FEDERAL POWER COMMISSION OVER CERTAIN INTERSTATE SALES OF NATURAL GAS

Mr. MAGNUSON. Mr. President, by request, I introduce, for appropriate reference, a bill to amend the Natural Gas Act to vest jurisdiction in the Federal Power Commission over certain interstate sales of natural gas for industrial use. I ask unanimous consent that a letter from the Chairman of the Federal Power Commission, requesting the proposed legislation, be printed in the RECORD.

The VICE PRESIDENT. The bill will be received and appropriately referred; and, without objection, the letter will be printed in the RECORD.

The bill (S. 1734) to amend the Natural Gas Act to vest jurisdiction in the FEDERAL POWER COMMISSION over certain interstate sales of natural gas for industrial use, introduced by Mr. Magnuson, by request, was received, read twice by its title, and referred to the Committee on Commerce.

The letter presented by Mr. Magnuson is as follows:

FEDERAL POWER COMMISSION
Washington, D.C., June 12, 1963.

HON. LYNDON B. JOHNSON,
President of the Senate,
Washington, D.C.

DEAR MR. PRESIDENT: I am submitting herewith as part of the Commission's 1963 legislative program a proposed amendment to section 1 of the Natural Gas Act to give the Federal Power Commission jurisdiction over direct interstate sales of natural gas by producers and by pipelines to industrial consumers. Most industrial consumers purchase natural gas from local distribution companies which, in turn, purchase if from interstate pipelines for distribution to residential, commercial, and industrial customers. Not infrequently, however, industrial customers buy from the pipeline directly or in some instances directly from a producer with a pipeline providing merely a transportation function.

Under existing law the Commission's authority is limited to sales for resale in interstate commerce: hence, *the price and other terms of a direct sale by a pipeline to an industrial consumer are outside the sphere of this Commission's regulatory authority.* Similarly, existing law can be construed to permit a natural gas producer to escape the Commission's rate jurisdiction by contracting directly with industrial consumers and having a new or existing pipeline transport gas for the producer's account.[1] As explained more fully below, this gap in the Commission's jurisdiction has not been closed by adequate State regulation. As a result, the pipeline companies have set industrial gas prices to some industrial customers at levels exceeding costs plus reasonable profits, and are free to discriminate between industrial customers. And natural gas producers seeking to escape the Commission's jurisdiction have attempted to make direct industrial sales of gas which would be transported over pipelines serving only industrial customers, even though this may lead to uneconomic transportation and may divert natural gas resources from consumer markets where its use is most in the public interest.[2]

The Natural Gas Act has been construed to leave the States free to regulate direct industrial sales, but many simply do not do so. In several States, attempts by regulatory commissions to assert jurisdiction over these sales have been thwarted by the pipelines in the State courts which have held that interstate pipelines selling to individual consumers on a contract basis are not "public utilities"[3] or that such

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[1] See, e.g., *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) (dictum): Southern California Edison Co., CP5-172, application filed Dec. 23, 1960. Order Permitting Withdrawal of Application and Terminating Proceeding issued Jan. 3, 1963; Gulf Pacific Pipeline Co., CP63-223, applications filed Feb. 12, 1963.

[2] Southern California Edison Co., supra, note 1: Gulf Pacific Pipeline Co., supra, note 1.

[3] *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill. 2d 509, 116 N.E.2d 394 (1953); *Public Utilities Commission v. Colorado Interstate Gas Co.*, 142 Colo. 361, 351 P.2d 241 (1960). See *Mississippi River Fuel Corp. v. Hoffman*, 4 Ill. 2d 468, 123 N.E. 2d 503 (1955); *City of St. Louis v. Mississippi River Fuel Corp.*, 97 P.2d 727 (8th Cir., 1938). Contra: *Re Panhandle Eastern Pipeline Co.*, 21 P.U.R. 3d 267 (1957) (Illinois Pub. Service Commission): *Re: Cities Service Gas Co.*, 1931 E. P.U.R. 11 (Mo. Public Service Commission).

sales are not "intrastate".[4] Consequently, these courts have held, the transactions are beyond the reach of the State commissions. Even the States which do regulate direct pipeline industrial sales frequently only require that the pipelines file rates negotiated between them and industrial customers, but, at least in the absence of complaint, do not examine the contracts to see if they are fair, reasonable, and nondiscriminatory.[5] The absence of effective State regulation of these sales may reflect the difficulty a State commission would face in determining the portion of an interstate pipeline's total cost of service applicable solely to direct industrial sales made within the particular State. That determination would be extremely complex and time consuming.

This system invites discrimination between customers on the basis of bargaining power—one of the principal evils public utility rate regulation is designed to cure.

Since State regulation of these sales, in most cases, is either nonexistent or ineffective, industrial rates charged by interstate pipelines are often much higher than could be justified by cost considerations. The attached schedule shows just how far out of line some pipelines' industrial sale prices are. Based on cost of service studies in connection with relatively recent rate cases, the figures show that seven out of eight major pipelines' revenues from industrial sales exceeded costs—including a reasonable return on investment—by amounts ranging downward from 57 percent. Only one company's revenues from such sales approximated costs (revenues were about 1½ percent greater) and one company's prices to its direct industrial customers yielded less than an adequate rate of return. The extent to which some industrial customers may have been required to pay prices higher than might have been the case had the Commission exercised jurisdiction over the ratio is suggested by one case where the company's rate for a sale subject to the jurisdiction of this Commission to a local distributor was 23.2 cents per thousand cubic feet while its rate for an unregu-

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[4] *Texas Gas Transmission Corp. v. Mississippi Public Serv. Comm'n.*, 241 Miss. 826, 133 So.2d 526 (1961); *United Gas Pipe Line Co. v. Mississippi Public Service Commission*, 241 Miss. 762, 133 So.2d 521 (1961).

[5] Minutes of the third meeting of the Federal Power Commission Natural Gas Advisory Council, Oct. 31, 1962, p. 3. A thorough search of reported State public utility commission decisions turned up only one case in which a State commission altered a rate an interstate pipeline charged an industrial customer.

lated direct sale to an industrial consumer was 45 cents per thousand cubic feet.[6]

In addition, very large percentage increases are sometimes forced upon industrial consumers: in one instance an industrial rate was raised almost 50 percent in 1 year.[7]

These facts strongly suggest that competition alone is often inadequate to prevent rates for industrial gas sales from rising beyond cost-justified levels. This is not surprising, since in some regions and for some purposes, gas is the only available or practical fuel[8] and a particular pipeline the only available supplier.

Not only is Commission jurisdiction over direct industrial sales necessary to protect industrial gas consumers, but it would also materially assist the Commission in better discharging its existing regulatory responsibilities.

One such responsibility is to make sure that wellhead prices for gas flowing in interstate commerce are "just and reasonable." Where producers make direct industrial sales outside the Commission's jurisdiction, the prices they receive are apt to exceed the Commission's area rate ceiling.[9] It is easy to understand that this gap in the statutory scheme for producer rate regulation provides an artificial incentive to producers to sell gas directly for industrial use rather than to pipelines for sale ultimately to domestic as well as industrial consumers. These above-ceiling sales also exert an inflationary pressure on jurisdictional sales by producers and may lead to widespread price increase under existing contracts for gas already flowing subject to the Commission's jurisdiction. This is because many existing contracts provide for price increases in the event a producer in the area receives a higher price than the seller is currently receiving from an interstate, jurisdictional

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[6] *Panhandle Easter Pipe Line Co.*, 21 P.U.R. 3d 267, 276 (1957). The rate to the distributor should be somewhat lower to reflect certain economies. However, the magnitude of the difference is probably out of proportion to that which could be justified by cost considerations.

[7] *Public Utilities Commission v. Colorado Interstate Gas Co.*, supra, note 3.

[8] See, e.g., *Public Utilities Commission v. Colorado Interstate Gas Co.*, supra, note 3, at 255.

[9] See authorities cited at note 1, supra.

pipeline.[10] As a result, unregulated direct industrial sales by producers may lead to increases in the prices of gas paid by pipelines and, ultimately by residential, commercial, and industrial customers whom the Natural Gas Act seeks to protect.

Another problem which would disappear if the Commission had jurisdiction over direct sales to industrial customers is the practice of some pipelines to refuse to deliver additional gas to local distributors for resale in order to sell it directly to industrial consumers.[11] Since the unregulated direct sale can frequently be made at higher rates, the reason for the pipeline's preference is obvious. But this practice often may not be in the public interest. In the first place, it means that less gas is available for resale to consumers for home heating—a use which the Commission, with court approval,[12] has found may frequently be the best use for natural gas.

Finally, direct industrial sales by pipelines or producers may, on occasion, prevent local distributors from making industrial sales within their service areas. These sales benefit home-heating customers by enabling local distributors to make sales during off-peak periods (i.e., when warm weather reduces demand for space heating), and thus to spread the cost of their distribution facilities and those purchased gas

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[10] See, e.g., *Shell Oil Co.*, Docket No. R161-515, Opinion No. 382 (decided Mar. 15, 1963), where new purchases from producers in west Texas were alleged to have triggered price increases under El Paso Natural Gas Co.'s contracts with other producers. The increase to which these producers were alleged to have become entitled, in turn, allegedly triggered price escalation clauses in a contract between El Paso and still another producer. See also *Pure Oil Co.*, 25 FPC 383, 387-91 (1961).

[11] The problem is illustrated by the proceedings in *Arkansas-Louisiana Gas Co.*, Opinion No. 355, Apr. 18, 1962, 27 FPC 697, reversed *sub nom Granite City Steel Co. v. F.P.C.*, C.A.D.C. Nos. 17150, 17151, May 23, 1963. Extension of the time in which to seek rehearing has been requested. There a group of Mississippi's distributor customers sought to compel the pipeline to sell them additional gas which it was making available to direct industrial customers at rates not subject to Commission jurisdiction and exceeding those the Commission permitted Mississippi to charge its distributor customers. *The Commission's order allocating additional gas to the distributors was set aside on review.*

[12] *F.P.C. v. Transcontinental Gas Pipe Line Corp.*, supra, note 1.

costs which do not vary with the amount taken[13] over a greater volume of sales. The cost per unit of gas that the residential and commercial space-heating customers must pay is, in turn, decreased. Thus, Commission jurisdiction to regulate direct industrial sales by pipelines could put an end to the pipelines' preference for such sales over sales to local distributors for resale, thereby benefiting the natural gas consumers for whose protection the Natural Gas Act was passed.

For these reasons—protection of industrial consumers, prevention of widespread field price increases under existing contracts, and removal of present incentives to withhold gas from local distributors in order to make it available for direct industrial sales—the Commission strongly recommends that it be given jurisdiction over direct industrial sales by natural gas companies. This authority will enable the Commission to require that interstate industrial gas sales will be made at such prices *and on such terms* as to realize the potential benefits of such sales to both industrial and domestic consumers.

Commissioner O'Connor has asked me to note his opposition to this proposal.

Sincerely,

JOSEPH C. SWIDLER,
Chairman

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[13] Many pipeline rate schedules provide for both a commodity charge—so much for each unit of gas taken—and a demand charge—so much for each unit of gas that the pipeline stands ready to deliver. The latter charge does not vary with the volume of gas the distributor actually uses.

MOTION FILED
MAR 17 1972

Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, et al.,
Respondents.

UNITED GAS PIPE LINE CO.
and
PENNZOIL UNITED, INC.,
Petitioners,

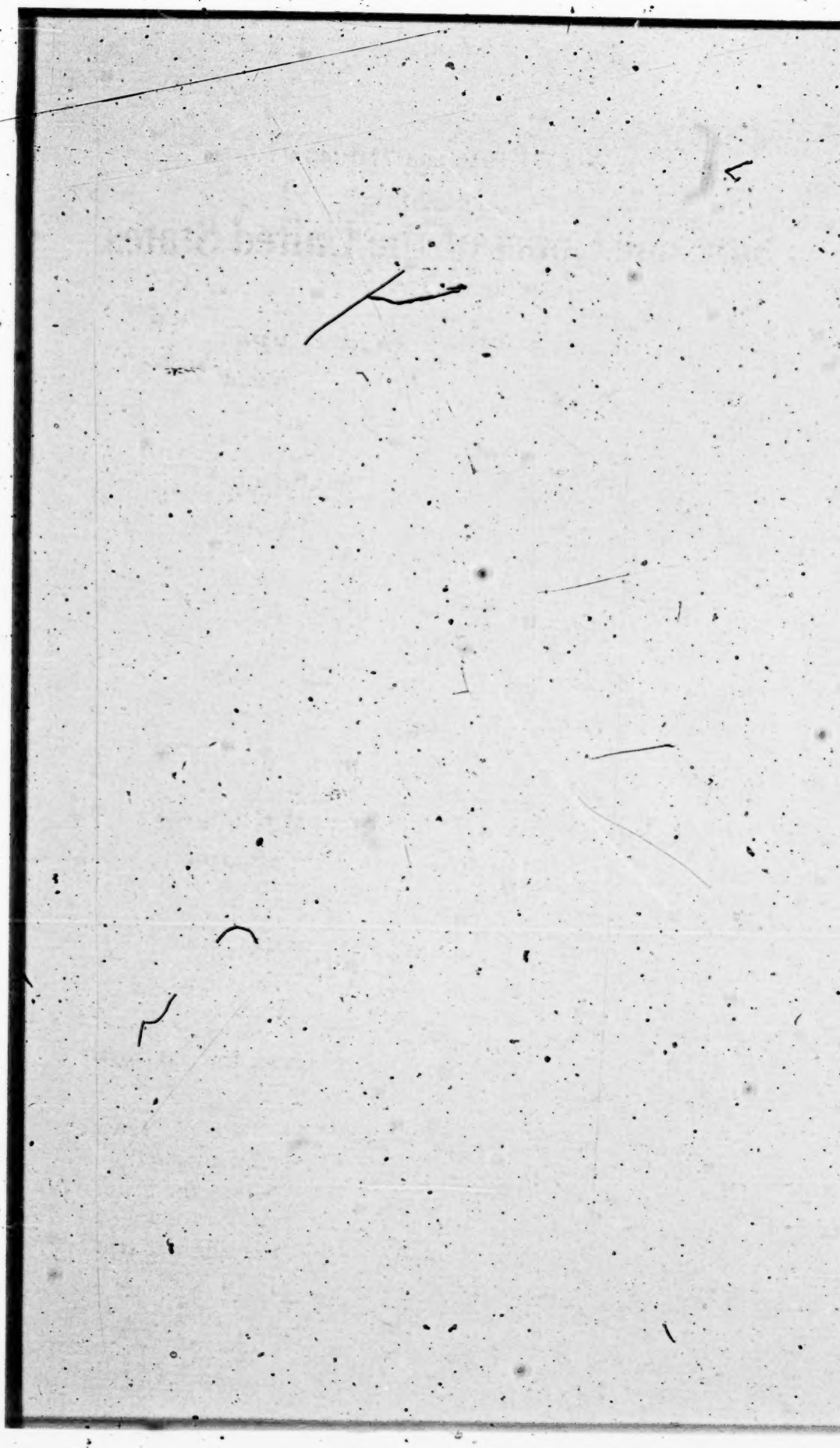
v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF FOR THE PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK, *AMICUS CURIAE*

PETER H. SCHIFF
Public Service Commission
for the State of New York
44 Holland Avenue
Albany, New York 12208
General Counsel

Washington, D. C. · THIEL PRESS · 202 · 393-0625



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LOUISIANA POWER & LIGHT COMPANY, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

The Public Service Commission for the State of New York (New York) moves this honorable Court for leave to file a brief *amicus curiae* in the above case.

The Public Service Commission for the State of New York is a regulatory agency of the state having jurisdiction *inter alia*, over sales of natural gas at retail within the state. Since virtually all natural gas sold within New York originates elsewhere and is sold to New York distributors by

pipelines whose rates and services are subject to the jurisdiction of the Federal Power Commission, the Public Service Commission has found it necessary to the protection of the interests of gas consumers in its state to intervene and participate actively in numerous proceedings before the Federal Power Commission directly or indirectly affecting natural gas service to New York.

In accordance with this practice the Public Service Commission has intervened and participated in a number of pending proceedings involving the curtailment plans of pipelines directly or indirectly serving New York, including the Federal Power Commission proceeding in Docket RP 71-29 involving the curtailment plans of the United Gas Pipe Line Company (United) which led to the court action under review in these proceedings. We have also intervened and are participating actively in another FPC proceeding, Docket CP 71-89, involving a United application to secure federal certification of certain sales it has been making in Louisiana, which is also the subject of the action under review.

The holdings by the court below that the Federal Power Commission lacked jurisdiction effectively to control the curtailment plans of United insofar as they relate to direct sales and lacked any jurisdiction over some of the sales for which United sought certificates, if permitted to stand would inevitably result in reducing the amount of gas United would have available to meet its other commitments, including its commitments to pipelines directly or indirectly providing service to the New York market. Since United is already curtailing a considerable percentage of the gas it is contractually obligated to sell such pipelines and this action has already required one of such pipelines to curtail deliveries to its New York customers, it is clear that affirmance of the decision below can only result in further serious damage to gas consumers in New York.

While the Public Service Commission for the State of New York is in general agreement with the position we understand the Solicitor General will take in this proceed-

ing on behalf of the Federal Power Commission, we believe that this Court's resolution of the important issues in this case will be aided by receipt of the views on the underlying jurisdictional questions by a state regulatory commission in one of the consuming states. The primary issues in this proceeding relate to the proper interpretation of those provisions of the Natural Gas Act, 15 U.S.C. 717(a), *et seq.*, which purport to assign discrete areas for federal and state regulation over the transportation and sale of natural gas in interstate commerce while still insuring that there will be a "comprehensive and effective regulatory scheme" affording adequate protection to the gas consumers the Act was enacted to protect. See *Panhandling Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 520; *Atlantic Refining Company v. Public Service Commission for the State of New York*, 360 U.S. 378, 388. The views on these questions of an interested state regulatory commission who actively participated in the proceedings before the Federal Power Commission will, we believe, be of value to this Court in its considerations. However, while consent to the filing of a brief *amicus curiae* has been secured from the petitioners, it has been refused by the respondent Louisiana Power & Light Company.

Accordingly, the Public Service Commission for the State of New York herewith moves that the Court accept for filing and consider its attached brief *amicus curiae* in the above proceeding.

Respectfully submitted,

PUBLIC SERVICE COMMISSION
for the STATE OF NEW YORK

PETER H. SCHIFF
General Counsel

Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

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Respondents.

BRIEF FOR THE PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK, *AMICUS CURIAE*

The Public Service Commission for the State of New York herewith files its brief, *amicus curiae*, in the above entitled cases. For the reasons set forth below we believe the decision of the Court of Appeals here under review is not only erroneous but seriously misconceives the relationship between federal and state regulatory authority over the curtailment practices of interstate pipelines established by

the Natural Gas Act, 15 U.S.C. 717(a), *et seq.* We therefore urge the Court to reverse the decision of the Court below.

NEW YORK'S INTEREST

The Public Service Commission for the State of New York is a regulatory body established under the laws of that state to insure, *inter alia*, that New York citizens receive adequate supplies of natural gas at the lowest prices consistent with the healthy growth of the gas distribution industry. See *McKinney's Consolidated Laws of New York*, Vol. 47. Virtually all of the natural gas consumed in New York State originates in other states, in large part from Southern Louisiana and the Texas Gulf Coast, and from the continental shelf offshore the states of Louisiana and Texas in the Gulf of Mexico. From these and other areas it is then transported into New York by a number of interstate pipelines which are subject to the rate and service jurisdiction of the Federal Power Commission, some of whom in turn purchase major portions of their gas from other pipelines. As a result of this situation the Public Service Commission has found it necessary, in order to protect the interests of gas consumers in its state, to intervene and participate actively in proceedings before the Federal Power Commission relating to the pipelines serving New York and their suppliers. See, *e.g.*, *Atlantic Refining Co. v. Public Service Commission for the State of New York* (*CATCO* case), 360 U.S. 378 (1959).

Of the six interstate pipelines presently providing gas to New York distribution companies, five, Transcontinental Gas Pipeline Corporation, Texas Eastern Transmission Company, Algonquin Gas Transmission Company, Consolidated Gas Supply Corporation, and Columbia Gas Transmission Company, presently have curtailment proceedings pending before the Federal Power Commission and two of these, both of which account for major amounts of gas consumed in New York, have actually found it necessary to curtail

firm service to the customers in New York and other states for extended periods during the present winter heating season. In addition, curtailment proceedings are pending involving a number of other pipelines who sell large amounts of gas to the pipelines serving New York. Predominant among these other pipelines is the United Gas Pipe Line Company, the pipeline involved in the present cases, which is a major supplier of gas to Texas Eastern and Texas Gas Transmission Corporation, and through them to Consolidated Gas Supply, and Algonquin Gas Transmission.[1] It is New York's understanding that the firm service curtailment which Texas Eastern has had to impose during the present winter heating season is the direct outgrowth of the curtailment in turn imposed on it by United Gas Pipe Line. It was for this reason, among others, that New York intervened and participated in the United curtailment proceeding before the Commission, and has intervened in the several petitions for review of the Commission's Opinion No. 606 therein which have been filed in the Fifth Circuit.

ARGUMENT

1. The Public Service Commission for the State of New York is in general agreement with the position stated in the Solicitor General's brief for the Federal Power Commission in this proceeding. We are convinced that a proper reading of the Natural Gas Act affords the Commission more than adequate power under Sections 4, 5 and 16 of the Act to control the curtailment plans and practices of the interstate pipelines subject to its jurisdiction with respect to the transportation of natural gas for both direct and indirect sales.

Sections 4 and 5 of the Act, like Section 7, are in terms applicable to the "transportation or sale of natural gas sub-

[1] While most of the pipelines serving New York make some direct sales (though none within New York), this is a relatively unimportant aspect of their business. However, major pipeline suppliers of the pipelines serving New York, including preeminently United, make extensive direct sales.

ject to the jurisdiction of the Commission." Thus, if as the court below correctly holds, the Commission under Section 7(c) and (e) of the Act must grant a certificate before a pipeline may transport the gas in interstate commerce to make a direct sale (See *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 232 F.2d 467 (3rd Cir., 1956), *cert. denied*, 352 U.S. 891), the transportation so certified is likewise subject to the provisions of Section 4(b) of the Act precluding a natural gas company from affording any undue preference or advantage to any person or any undue prejudice or disadvantage to any other, or from "maintaining any unreasonable differences in. . . service, facilities, or in any other respect between localities or as between classes of service" (See *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 173 F.2d 784, 789 (6th Cir., 1949)). And similarly the provisions of Sections 4, 5, and 16 authorizing the Commission to take action to correct violations of these basic standards are applicable with respect to all jurisdictional transportation of natural gas including that intended for direct sales, *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635, 647. Thus, even assuming *arguendo* that the court below was correct in its views as to the limits of the Commission's authority over direct sales under Section 7 of the Act, its summary conclusion (Pet. App. 21a) that these limitations are also applicable to the Commission's quite separate authority under Sections 4, 5 and 16 is a non-sequitur.

The Public Service Commission for the State of New York, like the regulatory authorities of many other states, has jurisdiction over direct sales made by interstate pipelines within its boundaries. This does not, of course, help it in any respect in the present situation, since United Gas Pipe Line Company, the pipeline involved, makes no sales, direct or for resale, in New York. And the fact that the states within which United operates have constitutional jurisdiction over its direct sales (See *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507) which they arguably could exercise in concert with

the Federal Power Commission to prevent discrimination between United's direct and resale customers in the course of any curtailment of service by the pipeline, does not mean that the Federal Power Commission lacks power under the Natural Gas Act to preclude such discrimination. For it is clear that it will not be to the interests of such states to limit the sales of gas to customers within their borders in order to avoid discrimination against customers in New York and other downstream locations.

Thus it is not surprising that this Court adverted to the curtailment question to support its conclusion in *Federal Power Commission v. Transcontinental Gas Corporation*, 365 U.S. 1, 27-28 that "when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than non-regulation." See also *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369-370. The fact is that the Federal Power Commission, since at least 1946, has asserted the authority it exercised here to deal with pipeline curtailment practices, including curtailments of direct sales, under Section 4, and 5 of the Act (See *City of Detroit v. Panhandle Eastern Pipe Line Co.*, 5 F.P.C. 983 (1946)), and this Court since 1947 has recognized that curtailments of pipeline service to direct and resale customers alike is a matter "largely related . . . to *transportation* and thus within the jurisdiction of the Federal Commission to control in accommodation of any conflicting interests among various states," *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra*, 332 U.S. at 516-517.

2. The lower court's conclusions that United's sales in the so-called "Green system" did not involve interstate commerce and were therefore beyond the reach of the Federal Power Commission's certification jurisdiction, is a classic example of improper judicial interference with a

pending agency proceeding. As the court noted the very issue it purported to decide on the basis of the evidence presented to the district court, was then pending before the Commission. And the Commission, in its decision in the curtailment proceeding, had expressly recognized that its jurisdiction over United's plans to curtail service to the customers involved in the pending certificate proceeding would depend upon the outcome of that decision. Nevertheless, without awaiting the Commission's own holding as to the scope of its jurisdiction over the sales, or the terms under which such sales would be certificated if it possessed jurisdiction,[2] the lower court concluded that the interstate flow of gas into the "Green system" was "occasional and irregular, as well as minimal" (Pet. App. 25a), and accordingly that "the regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction."

We believe that the lower court's views on the jurisdictional issue in the Commission's certificate proceeding are erroneous and completely inconsistent with the governing decisions of this Court.[3] But we agree with the brief for the Federal Power Commission that there is no need for this Court to consider these questions at this time, and that it should instead set aside this part of the lower court's opinion on grounds that the jurisdictional questions upon which it purported to pass were committed in the first instance to the Federal Power Commission, subject only to appropriate review pursuant to the provisions of Section 19 of the Natural Gas Act. In this respect we note that

[2]New York had intervened in the certificate proceeding because, at a time when it was seriously curtailing service to its other customers, United was proposing no volumetric limits on its sales to the Green system customers and had contracted to *increase* the sales volumes to some of them.

[3]See, *e.g.*, *California v. Lo-Vaca Gas Gathering Co.*, *supra*; *Federal Power Commission v. Florida Power & Light Company*, No. 70-38, decided January 12, 1972, ___ U.S. ___ 30 L.Ed.2d 600; *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205.

while the Commission has now issued an opinion in the certificate case (*United Gas Pipe Line Co.*, Docket No. CP71-89, Opinion No. 610, issued February 9, 1972) holding, *inter alia*, that it does have jurisdiction to certificate United's sales to customers on the "Green system," rehearing has been sought of this opinion. In any event the Commission's Opinion does not determine whether and under what conditions the sales should be certificated; those questions were remanded for further hearing since the Commission believed the record was inadequate to determine whether the statutory criteria for certification had been met.

CONCLUSION

For the reasons set forth above the decision of the Court below should be reversed and remanded with instructions to direct the district court to dismiss the action.

Respectfully submitted,

Public Service Commission
for the State of New York

Peter H. Schiff
General Counsel

Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

October Term, 1971

MOTION FILED

MAR 17 1972

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*,
Respondents.

No. 71-1040

UNITED GAS PIPE LINE CO., *et al.*,
Petitioners,

v.

LOUISIANA POWER & LIGHT CO., *et al.*,
Respondents.

MOTION OF THE BROOKLYN UNION GAS COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE BROOKLYN UNION GAS COMPANY IN SUPPORT OF PETITIONERS

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IN THE

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No. 71-1016

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Respondents.

No. 71-1040

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Petitioners,

v.

LOUISIANA POWER & LIGHT CO., *et al.*,
Respondents.

MOTION OF THE BROOKLYN UNION GAS COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 42, The Brooklyn Union Gas Company (Brooklyn Union), respectfully moves for an order granting leave to file a brief *amicus curiae*

on the merits in support of the relief requested by the Petitioners in these cases and shows the following:

1. Written consent to the filing of a brief herein by Brooklyn Union was received from Petitioners, the Federal Power Commission (FPC), Pennzoil United, Inc., and United Gas Pipe Line Company (United), but was refused by Respondent Louisiana Power & Light Company (LP&L).

2. Brooklyn Union is a utility company engaged in the distribution of gas at retail, primarily to domestic customers, hospitals, schools and small businesses, in a service area encompassing approximately one-half of the City of New York. Some 4,000,000 persons are dependent upon this Company for gas for heating, cooking and other essential uses.

3. Brooklyn Union obtains its entire gas supply from three interstate pipeline companies whose facilities originate in the state of Louisiana or other southwestern areas. A substantial portion of this supply is purchased by Brooklyn Union from Texas Eastern Transmission Corporation (Texas Eastern), which, in turn, obtains a substantial portion of its gas supply, directly and indirectly, from United, the Petitioner in No. 71-1040. Texas Eastern, which is not a party to this case, is the largest resale customer of United, purchasing approximately 17% of all gas sold by that pipeline.

4. Movant (like Respondent LP&L) has contracts with its pipeline suppliers entitling it to delivery of certain fixed volumes of gas. However, because of curtailments by United to Texas Eastern, Texas Eastern for some time has not met the contract requirements of Brooklyn Union. As a direct result of the United and Texas Eastern curtailments (and curtailments by another supplier), Brooklyn

Union has been compelled to limit severely the availability of new gas service in its franchise area. In addition, Brooklyn Union's ability to continue to render safe and adequate service to its existing customers is under serious strain.

5. The Fifth Circuit has held that the FPC lacks jurisdiction under the Natural Gas Act to approve or adopt a systemwide curtailment program for an interstate pipeline unable to meet the contract requirements of its customers to assure the equitable apportionment of available gas supplies among *all* its customers, including direct industrial, as well as resale, customers. This decision permits Respondent, a direct customer of United, to seek judicial assistance to compel full contract deliveries to it in contravention of United's curtailment procedures.

6. Since it is physically impossible for a gas-deficient pipeline to make full contract deliveries to its direct customers without further curtailing its resale customers, the decision below subjects Brooklyn Union to additional substantial reductions in gas deliveries through United and other pipelines which have direct industrial customers. Any further significant reduction in pipeline deliveries to Brooklyn Union will make it impossible for Movant to maintain existing levels of service and will necessitate the reduction or discontinuance of gas service to present domestic and other ultimate gas consumers in New York City.

7. Although Brooklyn Union may seek the same or similar relief as that requested by the Petitioners, it has a direct and immediate interest in the case which is different from, and cannot adequately be represented by, any party. Unlike any of the parties, Brooklyn Union (a) is a resale customer of United (through Texas Eastern) and stands to lose substantial volumes of urgently needed gas to Respondent and other direct industrial customers of its pipeline suppliers, if the decision below is permitted to stand, (b) is a public utility required by statute

(N.Y. Public Service Law, Sec. 65 (McKinney 1955)) and its municipal franchises and consents to provide safe and adequate service, without discrimination, to gas consumers in its franchise area, and (c) is a gas distribution company, which "as a matter of ethics and good business * * * is required to protect its customers" and to participate as the representative of consumers in proceedings such as this, which directly affect their interests and welfare. *Pub. Serv. Comm'n. v. FPC*, 257 F. 2d 717, 720 (3d Cir. 1958), aff'd on other grounds *sub nom. Atlantic Rfg. Co.* v. *Pub. Serv. Comm'n.*, 360 U.S. 378 (1959).

8. Brooklyn Union believes that the following facts and questions of law, among others, are relevant to the Court's determination of whether the FPC has jurisdiction to regulate the equitable apportionment of insufficient natural gas supplies between direct industrial customers, and all other consumers served by resale customers, of an interstate pipeline company:

a. The impact of the decision below on ultimate consumers throughout the nation served by resale customers of gas-deficient interstate pipeline.

b. Whether state or local authorities can legally and practicably regulate in the disputed area. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-20 (1961).

c. Whether a negative determination on federal regulatory jurisdiction would create a no-man's-land inconsistent with the intent of the Natural Gas Act "to create a comprehensive and effective regulatory scheme". *Panhandle Eastern Pipe Line Co.* v. *Pub. Serv. Comm'n.*, 332 U.S. 507, 520 (1947).

9. Brooklyn Union submits that the foregoing relevant facts and questions cannot be adequately presented in a case in which none of the parties is a resale customer directly affected by the decision under review. If the present mo-

tion is granted, Brooklyn Union's brief *amicus curiae* will be addressed to these issues.

WHEREFORE, Brooklyn Union requests leave to file a brief *amicus curiae* in this proceeding.

Respectfully submitted,

/s/ BARBARA M. GUNTHER

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March 1972

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*,
Respondents.

No. 71-1040

UNITED GAS PIPE LINE CO., *et al.*,
Petitioners,

v.

LOUISIANA POWER & LIGHT CO., *et al.*,
Respondents.

BRIEF OF *AMICUS CURIAE* THE BROOKLYN UNION GAS COMPANY IN SUPPORT OF PETITIONERS

Interest of *Amicus Curiae*

The interest of Brooklyn Union in this case is set forth in its motion (bound herewith) for leave to file a brief *amicus curiae* as follows:

[Brooklyn Union] is a utility company engaged in the distribution of gas at retail, primarily to domestic customers, hospitals, schools and small businesses, in a service area encompassing approximately one-half of the City of New York. Some 4,000,000 persons are dependent upon this Company for gas for heating, cooking and other essential uses.

[Brooklyn Union] obtains its entire gas supply from three interstate pipeline companies whose facilities originate in the state of Louisiana or other southwestern areas. A substantial portion of this supply is purchased by Brooklyn Union from Texas Eastern Transmission Corporation (Texas Eastern), which, in turn, obtains a substantial portion of its gas supply, directly and indirectly, from United, the Petitioner in No. 71-1040. Texas Eastern, which is not a party to this case, is the largest resale customer of United, purchasing approximately 17% of all gas sold by that pipeline.

[Brooklyn Union] (like Respondent LP&L) has contracts with its pipeline suppliers entitling it to delivery of certain fixed volumes of gas. However, because of curtailments by United to Texas Eastern, Texas Eastern for some time has not met the contract requirements of Brooklyn Union. As a direct result of the United and Texas Eastern curtailments (and curtailments by another supplier), Brooklyn Union has been compelled to limit severely the availability of new gas service in its franchise area. In addition, Brooklyn Union's ability to continue to render safe and adequate service to its existing customers is under serious strain.

The Fifth Circuit has held that the FPC lacks jurisdiction under the Natural Gas Act to approve or adopt a systemwide curtailment program for an interstate pipeline unable to meet the contract requirements of its customers to assure the equitable apportionment

of available gas supplies among *all* its customers, including direct industrial, as well as resale, customers. This decision permits Respondent, a direct customer of United, to seek judicial assistance to compel full contract deliveries to it in contravention of United's curtailment procedures.

Since it is physically impossible for a gas-deficient pipeline to make full contract deliveries to its direct customers without further curtailing its resale customers, the decision below subjects Brooklyn Union to additional substantial reductions in gas deliveries through United and other pipelines which have direct industrial customers. Any further significant reduction in pipeline deliveries to Brooklyn Union will make it impossible for Movant to maintain existing levels of service and will necessitate the reduction or discontinuance of gas service to present domestic and other ultimate gas consumers in New York City.

ARGUMENT

I

The Fifth Circuit erred in finding that the FPC lacks jurisdiction over systemwide pipeline curtailment programs.

The decision of the Fifth Circuit, holding that the FPC lacks jurisdiction to approve or order pipeline curtailment programs on a systemwide basis to direct industrial, as well as to resale customers, is inconsistent with the holdings and reasoning of prior decisions by this Court and by other Federal courts. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961); *Panhandle Eastern Pipe Line Co.*, v. *Pub. Serv. Comm'n.*, 332 U.S. 507 (1947); *Michigan Con-*

sol. Gas Co. v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (6th Cir. 1949); *Panhandle Eastern Pipe Line Co.* v. *Michigan Consol. Gas Co.*, 177 F. 2d 942 (6th Cir. 1949).

These decisions all indicate that, by virtue of its broad jurisdiction over the interstate transportation of gas by pipeline, the FPC has regulatory authority over the system-wide disposition of limited natural gas supplies, even though it may lack continuing power over the rate aspects of pipelines' direct sales. We believe these decisions will be fully briefed by the Petitioners, and therefore limit our argument on this aspect of the case to an analysis of the basic rationale employed in judicially construing Natural Gas Act provisions concerning the scope of FPC jurisdiction.

This basic rationale, which has been emphasized time and time again by this Court and which was ignored by the Fifth Circuit, is that the Natural Gas Act was intended by Congress to be a remedial statute, and must therefore be broadly construed where necessary to accomplish its purpose of affording a complete and effective bond of regulation of the natural gas industry for the benefit of ultimate consumers. 332 U.S. 507, 520.

This legislative intent has caused this Court to measure the FPC's jurisdiction as follows: "* * * in a borderline case where congressional authority is not explicit, we ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs." 365 U.S. 1, 19-20.

The intent of Congress in enacting the Natural Gas Act is no longer subject to debate. Faced with numerous

judicial determinations by this and other Courts which emphasized the inability of state and local authorities to effectively protect the public interest through regulation of the interstate aspects of the natural gas industry, Congress acted to create a national agency with power to regulate "* * * particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 503 (1949).

A most significant determination in the context of this case is *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), in which the Court held that an attempt by state authorities to interfere with the flow of natural gas in interstate commerce, or to allocate gas being transported by pipelines in interstate commerce to resale *and* direct sale customers, was prohibited by the Commerce Clause of the United States Constitution. It was found that such action, "* * * which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce,—a prohibited interference [citing several cases]." 262 U.S. 553, 596-97. See also *Illinois Natural Gas Co.* v. *Pub. Serv. Co.*, 314 U.S. 498 (1942); cf. *Pennsylvania Gas Co.* v. *Pub. Serv. Comm'n.*, 252 U.S. 23 (1920) (state *rate regulation* of local retail sales of interstate pipeline not violative of the commerce clause). The decision in *Pennsylvania* v. *West Virginia* was known to Congress when the Natural Gas Act became law, and, though rendered many years ago, dealt with issues almost identical to those presented herein.

Apart from the constitutional impediment, there is no area in which state authorities are more ill-equipped or

have less incentive to protect the interests of ultimate gas consumers in the several states than the area of equitable distribution of the limited gas supplies of a curtailing pipeline.[1] There is no better example than the present controversy of the inequity and futility of attempting to deal with such problems in local forums.

Here, a proceeding had been instituted and was in progress before the FPC to determine the lawfulness of United's curtailment program, based on the standards set forth in the Natural Gas Act and an analysis of the various markets affected by United's curtailment. Brooklyn Union, LP&L, and many other United customers were parties to this proceeding and had full opportunity to present evidence before that single forum to support their views on the propriety of United's program and alternatives thereto.

While that proceeding was in progress and without notice to other interested parties, the Respondent, a direct sale customer of United, brought the present action in a District Court in Louisiana to enjoin United from curtailing any contract deliveries to it. Neither that court nor the Fifth Circuit was equipped to make the type of analysis required to insure protection of the public interest under the circumstances. Nor can it be said that state authorities are in any better position to deal with such matters.

When this very problem was brought to the attention of this Court, it held, consistently with its decision in *Penn-*

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1. A similar inability of local authorities to deal with problems of conservation of natural gas resources for beneficial end uses led the Court to find that the FPC had authority to consider such matters in connection with pipeline transportation of gas. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 20-22 (1961).

sylvania v. *West Virginia* and the legislative intent embodied in the Natural Gas Act, that curtailment of service to direct sale customers is a matter "largely related * * * to transportation and thus within the jurisdiction of the Federal Power Commission * * *." *Panhandle Eastern Pipe Line Co.* v. *Pub. Serv. Comm'n.*, 332 U.S. 507, 523 (1947); see also *Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 790 (6th Cir. 1949). That statement is sound, reasonable, and consistent with the basic rationale consistently employed in determining the scope of FPC jurisdiction under the Natural Gas Act. That conclusion clearly requires reversal of the Fifth Circuit's contrary determination as to FPC jurisdiction over interstate pipeline curtailments in this case.

II

The Fifth Circuit erred in reversing the District Court's dismissal of LP&L's claim for specific performance.

The controversy before the Court arises from an action for *specific relief* brought in a Louisiana District Court by LP&L against United and United's parent, Pennzoil United, Inc. LP&L seeks an injunction to prevent United and Pennzoil from curtailing gas deliveries to two of LP&L's generating stations (R. 1-16).[2] LP&L's complaint does not seek *damages* for breach of its gas purchase contract by United; the Fifth Circuit did not consider that remedy; and the case was not remanded to the District Court for consideration of that remedy.

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2. This reference is to the Record Appendix in the Fifth Circuit.

Accordingly, no issues are before the Court in this case concerning the damage remedy, as distinguished from the remedy of specific performance. The two remedies are distinct, and involve different questions of fact, law, public policy and the extent of the FPC's power to confer immunity on curtailing pipelines against *financial* responsibility for breach of contract. *Cf. Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (6th Cir. 1949) and *Panhandle Eastern Pipe Line Co.* v. *Michigan Consol. Gas Co.*, 177 F. 2d 942 (6th Cir. 1949) with *Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 226 F. 2d 60 (6th Cir. 1955), *cert. den.* 350 U.S. 987 (1956).

These decisions of the Sixth Circuit hold that an FPC approved curtailment plan is a complete defense to a collateral claim for injunctive relief from curtailments effected pursuant to such plan. This sound principle follows necessarily from the conclusion that the FPC has jurisdiction to allocate gas supplies among direct and resale customers. Thus, the Fifth Circuit erred in reversing the District Court's dismissal of LP&L's request for specific relief.

III

The Fifth Circuit erred in declining to dismiss the District Court action for failure to require the joinder of indispensable parties.

The factual predicate for this case is a very simple and practical one. For whatever reasons, excusable or otherwise, United cannot meet its full contract obligations to all customers. Accordingly, if United is required to meet its

full contract commitments to one customer or class of customers, it must further reduce deliveries to other customers.

If, as the Fifth Circuit has held, the FPC lacks jurisdiction to order, approve, or modify pipeline curtailments on a systemwide basis, apparently the only forum for adjudication of the respective entitlements of all United's customers to its limited supply of gas is the Federal District Court in which LP&L's action for specific performance is pending. None of United's customers (other than LP&L) are parties to that action.

It is clear that the grant of the relief sought by LP&L would significantly impair the rights of other customers of United by further reducing the pipeline's ability to meet their requirements. Moreover, a failure to join all affected customers could well expose United to multiple litigation and inconsistent obligations to deliver gas. Finally, it is clear that the final judgment herein cannot be conditioned or shaped to avoid prejudice to these absent customers. Accordingly, we submit that these customers are indispensable parties, under the tests set forth by this Court in *Shields* v. *Barrow*, 58 U.S. (17 How.) 129 (1854) and codified in Rule 19 of the Federal Rules of Civil Procedure (28 U.S.C., Rule 19).[3]

It is important to note that LP&L's claim is not made in an action brought by the FPC to protect the public interest, but is rather an attempt by that litigant to enforce its pri-

3. This Court has an obligation to require joinder of indispensable parties or dismiss the action, even if the issue of joinder was not raised at the trial level. *Hoe* v. *Wilson*, 76 U.S. (9 Wall.) 501 (1869); *Haby* v. *Stanolind Oil and Gas Co.*, 225 F.2d 723 (5th Cir. 1955), decision on the merits reported at 228 F.2d 248.

vate rights to United's limited gas supply. Since the determination of LP&L's rights in the District Court would necessarily affects the rights of all other customers of United to that common source of supply, the rationale of *Commonwealth Trust Co.* v. *Smith*, 266 U.S. 152 (1924), requires reversal of the Fifth Circuit's decision. See also *California* v. *Southern Pac. Co.*, 157 U.S. 229 (1895); cf. *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 364 (1940).

Moreover, the absence of indispensable and necessary parties to this case is but another indication of the valid and persuasive public interest considerations requiring authority in a single federal agency equipped to deal with interstate pipeline curtailments to both direct and resale customers.

IV

The Fifth Circuit erred in prematurely and erroneously adjudicating the jurisdictional status of United's "Green System".

As to the jurisdictional status of the so-called "Green System" of United, we rely upon the decisions of this Court in *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515 (1945) and *FPC* v. *Florida Power & Light Co.*, 40 U.S.L.W. 4141 (Jan. 12, 1972), each of which appear to require reversal of the Fifth Circuit's determination on this aspect of the case.

The "de minimus" basis for determinations of this kind has not only been rejected by this Court, but is also factually incorrect, as indicated by the FPC's Opinion 610. United Pet., App. F, pp. 97a-106a. This factual error

illustrates the most cogent reason for the judiciary to defer to the FPC in such determinations. In the words of this Court:

> Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on 'engineering and scientific' considerations, we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact. 40 U.S.L.W. 4141, 4144.

When confronted with a similar invitation to dispense with FPC expertise and pre-determine a factual issue under consideration by that agency, the Sixth Circuit wisely and correctly deferred to the FPC, stating:

> Such determination must, it seems, be made by those entrusted with supervision and regulation rather than by courts, and even were we to conclude that the district court has jurisdiction to grant the relief here prayed, there would remain the question whether its exercise would be appropriate. It would impair public confidence in courts, if a decree directing the construction sought at Edgerton could be nullified by a determination of the Commission that undue preference or prejudice would result from such construction, or conversely, confidence in and the efficiency of the Commission would be destroyed if its determination became a nullity by reason of the overriding authority of court decree.
>
> *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 789 (6th Cir. 1949).

We also believe it appropriate in this respect to defer to the FPC's views on the primacy of its own jurisdiction, and do so here, though we submit that the foregoing considerations alone require reversal of the Fifth Circuit decision on the jurisdictional status of the "Green System".

CONCLUSION

For the foregoing reasons, we ask the Court to reverse the decision of the Fifth Circuit and dismiss the complaint of Louisiana Power & Light Company herein.

Respectfully submitted,

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March 1972

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IN THE

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OCTOBER TERM, 1971

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BRIEF OF THE CITY OF NEW YORK, *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION,

Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, et al.,

Respondents.

No. 71-1040

UNITED GAS PIPE LINE COMPANY, et al.,

Petitioners,

v.

LOUISIANA POWER & LIGHT COMPANY, et al.,

Respondents.

BRIEF OF THE CITY OF NEW YORK, *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The City of New York has a direct and substantial interest in the maximum availability of natural gas for use

in its area and more particularly in the various curtailment plans under consideration by the Federal Power Commission which are designed to alleviate the effects of present and future shortages of natural gas.

The decision of the court below would deprive the Federal Power Commission under the Natural Gas Act of jurisdiction with respect to curtailing natural gas deliveries by interstate pipelines to direct users, as distinguished from purchasers for resale. The effect of such a limitation on jurisdiction would result in a drastic reduction in the quantity of natural gas which would remain subject to allocation among consumers, including domestic users, in times of a natural gas shortage.

In this City, there are approximately 2,500,000 households which depend on the use of natural gas for the common necessities of life, rendering the use of gas indispensable to virtually all of its residents.[1] In addition, the City itself is a substantial user in its many public buildings such as schools, hospitals, libraries, museums and police and fire installations. It also has a vital interest in the maximum practicable supply of natural gas in aid of the difficult effort to meet local and Federal standards of air quality.

The City has intervened and will continue to seek intervention before the Federal Power Commission in curtailment proceedings affecting its area. Such proceedings will be conducted at a severe disadvantage if the decision of the court below is affirmed and the quantity of gas involved in direct sales is subtracted from the aggregate to be apportioned among other consumers according to a curtailment order.

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[1] By State law, the City is empowered to represent its residents in matters affecting utility service. *N.Y. Public Service Law*, § 109.

ARGUMENT

The Natural Gas Act authorizes the Federal Power Commission to exercise jurisdiction over curtailment of gas supply involving direct sales for consumptive use.

(1)

This controversy stems from the critical shortage of natural gas. The issue relates to the extent of the authority of the Federal Power Commission (Commission) under the Natural Gas Act (Act) to cope with it. The practical effect of the decision below would be to exempt substantial quantities of gas, sold for direct use, from curtailment plans in proceedings before the Commission by which available gas may be equitably allocated among consumers in order to serve the public interest.

The case on review in this Court originated in the United States District Court for the Western District of Louisiana wherein the Louisiana Power & Light Company (LP&L), respondent herein, sought an injunction requiring the United Gas Pipe Line Company (United), a petitioner herein, to make delivery of the full amount of natural gas provided by contract. As a direct customer, LP&L uses the gas as boiler fuel at one of its electric generating stations.[2] It contends that the Act does not confer jurisdiction on the Commission to entertain a curtailment plan involving its direct contractual purchases for consumptive purposes as distinguished from sales for resale.

At the time of the commencement of the action in the District Court, there was pending before the Commission

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[2] The petitions for certiorari granted herein also raise the contention that the court below erred in a secondary holding to the effect that the mixture of a relatively small quantity of interstate gas delivered to another of respondent's electric generating stations did not convert an otherwise local system to an interstate facility. This brief does not argue the point.

a curtailment proceeding involving all of United's deliveries, including those to LP&L. LP&L intervened and challenged the Commission's jurisdiction to curtail direct contractual sales, even though by means of transportation facilities previously certificated. Prior to the decision below but after the disposition of the action in the District Court, the Commission made its determination and held, among other things, that it had plenary jurisdiction under the Act to approve or modify curtailment plans involving gas transported both to direct and resale customers. Petitions for review of the Commission's decision are presently pending before the court below.

The final judgment of the District Court resulted in a dismissal of LP&L's complaint on the grounds that the Commission had exclusive jurisdiction over curtailments and that there had been a failure to exhaust administrative remedies. The Court of Appeals reversed on the ground that the Commission lacks jurisdiction to order curtailments in respect of the direct sales here involved. This Court granted certiorari.[3]

(2)

The three basic elements of Commission jurisdiction in relation to natural gas in interstate commerce are recited in Section 1 (b) of the Act. Its provisions apply (1) to transportation, (2) to sales for resale and (3) to companies engaged in either of those activities. As to sales, application is limited to those for resale. No corresponding limitation qualifies the Commission's jurisdiction over transportation or companies engaged in transportation.

It is contended that the Commission derives its jurisdiction over curtailment by reason of its express jurisdic-

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[3] While granting certiorari to review the judgment of the court below, this Court denied certiorari to review the order and opinion of the Commission before judgment on review by the court below.

tion over transportation. In *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947), this Court said that (p. 523):

> "the matter of interrupting service is one largely related * * * to transportation and thus within the jurisdiction of the Federal Power Commission to control * * *."

In construing the Act, the Court of Appeals discerned a jurisdictional gap or "no man's land"[4] in the powers which the Congress intended to confer on the Commission, predicated on the distinction in interstate transactions between sales for resale and direct sales to industrial customers. It decided that the Commission's authority to modify or impose conditions on a certificate of public convenience and necessity does not extend to a certificate issued for facilities to transport gas for direct use. The court found no such specific grant of power in the Act covering the lifespan of a transportation facility from the time of the Commission's issuance of a certificate under Section 7 (c) to the time of the Commission's approval of an abandonment under Section 7 (b). Not finding specific authority, the court concluded that none exists and that a direct use certificate once issued may not be later modified[5] in order to enable the Commission to include such gas in its consideration of curtailment plans.

(3)

A case which is of the greatest significance in relation to the extent of the Commission's authority in the issu-

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[4] *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 11 (1957), cited in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961).

[5] Implicit in the lower court's holding is the recognition that construction certificates relating to resale gas are subject to the Commission's continuing jurisdiction.

ance of certificates for transportation facilities is *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961). There the natural gas in question was not for resale but was destined to be burned under boilers in the generation of electricity, just as in the case here in controversy.[6] The question was whether the Commission's jurisdiction was confined to the conventional tests for the issuance of a certificate under Section 7 (e), such as the adequacy of gas reserves and pipeline facilities and the market for the gas (p. 4), or whether, as the Commission contended, it was entitled to consider matters of "policy" embracing "end use" and "price". The Commission's argument was more fully described by this Court as including the contentions (p. 5):

> "that the gas was to be transported for use under industrial boilers, this disposition being an 'inferior' use from the standpoint of conserving a valuable natural resource; that authorization of this and similar direct sales to major industrial users would result in pre-emption of pipeline capacity and gas reserves to the detriment of domestic consumers competing for gas supply; and that the effect of this sale, as well as the resulting increase in direct sales, would effect a general rise in field prices."

This Court sustained the exercise of discretion by the Commission in taking cognizance of the foregoing factors and upheld the denial of the certificate. When the Court posed the first question (p. 8), "whether the Commission, through its certificate power, may prevent the waste of gas committed to its jurisdiction", it answered affirmatively. And when the Court stated the second question

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[6] The only difference is that United was the seller in the case at bar and Transcontinental was the transporter only, the gas having been purchased by the electric utility directly from producers in the field. The difference is of no moment since the issue in both cases depends on the Commission's jurisdiction over transportation.

(p. 25), "whether in a § 7 [certificate] proceeding the Commission may consider sales price," it also answered in favor of jurisdiction.

In so holding, the Court indicated that the issuance of a certificate for facilities to transport gas for other than resale is not to be so narrowly circumscribed as the Court of Appeals would construe the Act. If the Commission may take cognizance of "end use" and "price" considerations in the issuance of such a certificate, there would appear to be no basis for differentiating it from a certificate where the gas is to be resold insofar as the Commission's continuing jurisdiction over transportation may be concerned.

That the Act is not to be narrowly construed was made plain in *Transcontinental*. There the Court said (365 U.S. at pp. 19-20):

> ". . . when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. [citing case]. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs."

And again (p. 28):

> "The point, is as we have stated, that Congress did not desire an 'attractive gap' in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource. Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions

> can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation."

Certainly, state commissions could not competently deal with a subject so inherently interstate as curtailment, and federal jurisdiction in the circumstances is, therefore, comprehensive and all-inclusive.

It is submitted that the decision in *Transcontinental* alone is sufficient to overcome the reasoning of the Court of Appeals. In addition, that court failed to give proper significance to other provisions of the Act which reinforce the Commission's authority. Sections 4 (b) and 5 (a) deal with the obligations of natural gas companies engaged in transportation, the third subject of Commission jurisdiction in Section 1 (b). Both of these sections relate to the proscription of undue preference in a variety of matters including, not merely rates but service, facilities and classifications of service as well. It may thus be concluded that the Commission has authority over curtailments involving undue preference irrespective of whether the gas is sold directly or for resale.

Furthermore, the Commission's continuing jurisdiction over all certificates may not be questioned in view of the omnibus powers in respect of its orders granted by Section 16. That section reads in part:

> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."

In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), reference was made to Section 16. It was said (p. 776):

> "This Court has repeatedly held that the width of administrative authority must be measured in part by

the purposes for which it was conferred * * *. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority."

CONCLUSION

The judgment appealed from should be reversed.

March 17, 1972.

Respectfully submitted,

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of the City of New York,
Amicus Curiae.

Stanley Buchsbaum,
Peter C. Demetri,
Francis T. Howley,
Ira H. Zuckerman,
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SUPREME COURT, U. S.

MOTION FILED

MAR 17 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-1016 and 71-1040

FEDERAL POWER COMMISSION, *Petitioner*,

v.

LOUISIANA POWER & LIGHT CO., ET AL., *Respondents*.

UNITED GAS PIPE LINE CO. AND PENNZOIL UNITED, INC., *Petitioner*,

v.

LOUISIANA POWER & LIGHT CO., ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF COLUMBIA GAS TRANSMISSION CORPORATION, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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March 17, 1972

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF COLUMBIA GAS TRANSMISSION CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Columbia Gas Transmission Corporation (Columbia) hereby moves pursuant to Rule 42 of this Court for leave to file its Brief *Amicus Curiae*. In view of the short briefing schedule, it was not physically possible to obtain the written consent of the parties as provided in Rule 42. Request for such consent is being made contemporaneously with the service of this Motion and, if received, such consents will be filed pursuant to Rule 42.

The interests of Columbia as *Amicus Curiae* are stated under the appropriate heading in the attached Brief. The essential interest of Columbia is to present the concern of Columbia, as an indirect purchaser of natural gas from United Gas Pipe Line Company (United) and as a major supplier of gas to a highly important area of this country. The impact of the lower court's decision on Columbia would be substantial. Columbia believes that its interest will not be adequately represented by other parties.

Columbia respectfully submits that its presentation will assist this Court in its review of the lower court decision, and hereby moves for leave to file its Brief *Amicus Curiae*.

Respectfully submitted,

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March 17, 1972

IN THE

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF COLUMBIA GAS TRANSMISSION CORPORATION, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

INTEREST OF COLUMBIA GAS TRANSMISSION CORPORATION, AMICUS CURIAE

Columbia Gas Transmission Corporation (Columbia) is a natural gas company subject to the regulatory jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act (The Act), 52 STAT. 821-833, as amended, 15 U.S.C. 717-717w.

Columbia furnishes natural gas to four million ultimate consumers in the seven state area of Kentucky, Maryland, New York, Ohio, Pennsylvania, Virginia, West Virginia and in the District of Columbia. With one very minor exception, all of Columbia's sales are sales for resale in interstate commerce subject to the Commission's jurisdiction.

Columbia purchases gas indirectly from United Gas Pipe Line Company (United) through two other pipeline companies, Texas Eastern Transmission Corporation (Texas Eastern) and Texas Gas Transmission Corporation (Texas Gas) pursuant to agreements and rates subject to the Commission's continuing jurisdiction. Columbia also purchases gas from three other pipeline companies, which do not purchase gas from United. In addition to Texas Eastern, two other natural gas pipeline companies are presently unable to make full contract deliveries to Columbia.

All service volumes and agreements with the foregoing suppliers were certificated by the Commission. In reliance thereon, Columbia has taken on substantial contractual obligations, which in turn have been the basis for its distribution customers, located in the foregoing seven states and the District of Columbia, committing to serve millions of residential and thousands of commercial and industrial customers.

Columbia, during the past two years, has implemented increasing restrictive sales limitation policies as a result of the natural gas shortage. Columbia has recently advised its customers that it will not make any increased sales during the next winter season. Columbia has also filed a comprehensive curtailment plan with the Commission. As a result, many of Columbia's dis-

tribution customers have taken steps to stop providing additional service of any kind to existing or new customers, including residential consumers.

The significance of the foregoing is that any substantial reduction in Columbia's existing supply by reason of the Fifth Circuit's decision (a result that seems inevitable) is that *existing* customers (literally thousands of industries with thousands of employees) could be sharply curtailed. The adverse ramifications of such reduction must be considered by the Commission, together with many other factors in arriving at appropriate allocation of United's gas. Accordingly, the Fifth Circuit's denial of the Commission's jurisdiction over allocation of United's service to its direct sales, should be reversed.

Columbia's interest thus is simply that it must protect existing service to a vitally important area of this nation. The decision under review threatens Columbia's public service obligation by directly affecting a substantial part of its gas supply and by creating a legal precedent which could jeopardize Columbia's gas supply from other pipeline companies.

ARGUMENT

Columbia assumes that Petitioners and other *amici curiae* in support of Petitioners will fully present the legal arguments in support of the proposition that the Commission has continuing jurisdiction over all transportation of gas in interstate commerce by natural gas pipelines, including transportation of gas for direct industrial sales of the nature purchased by Louisiana Power & Light Company from United.

It is also assumed that there will be adequately presented the argument that all parties necessary to an allocation of gas on United's system were not joined and made parties to the proceedings here subject to review.

Against this background, Columbia submits the following for the consideration of the court:

The decision of the Fifth Circuit is in direct contradiction of the Commisson's determination of jurisdiction in its Opinions 606 and 606-A. The decision would permit random determinations by local courts of allocations of natural gas supplies of natural gas companies. Such random determinations would result in utter chaos throughout the industry and the country. If the Fifth Circuit decision is allowed to stand, its application to other direct industrial sales by United and by all other interstate pipelines lacking adequate supplies to meet their contractual commitments will have an immediate disastrous effect not only on Columbia but on the ultimate gas consumers through the country.

The administrative proceeding before the Commission in the United's curtailment proceeding at Commission Docket No. RP71-29 consisted of 44 days of contested hearings. The conflicting issues of public interest are in the record and have been voluminously briefed. Detailed analysis of many complex interrelated factors are involved in such proceedings. It is inconceivable that service to one customer (such as Louisiana Power & Light) or one group of customers (such as direct industrial customers) could be segregated for separate treatment by a court with relatively little expertise in such matters.

Simply stated:

(i) Since the Commission has jurisdiction under Section 7 of the Act to certificate the interstate transportation of gas for both direct and jurisdictional sales;

(ii) It is inconceivable that, at some subsequent time when the gas supply is inadequate to support all the sales, the Commission is powerless under the Act to determine the appropriate allocation of the shortage among all the sales.

Yet, this is exactly the effect of the Fifth Circuit Court's holding.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Fifth Circuit's decision as to jurisdiction must be reversed.

Respectfully submitted,

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March 17, 1972

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No. 71-1040

UNITED GAS PIPE LINE CO. AND PENNZOIL UNITED, INC.,
Petitioners,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

MOTION OF PIPELINE INTERVENORS FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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March 16, 1972

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In The

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Louisiana Power & Light Company, *et al,*

Respondents.

No. 71-1040

United Gas Pipe Line Co. and Pennzoil United, Inc.,

Petitioners,

v.

Louisiana Power & Light Company,

Respondent.

Motion of Pipeline Intervenors for Leave to File Brief Amicus Curiae and Brief Amicus Curiae

---

Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Southern Natural Gas Company, Texas Eastern Transmission Corporation and Texas Gas Transmission Corporation (Pipeline Intervenors) respectfully move for leave to file the attached brief *amicus curiae* in this case. Pipeline Intervenors have previously filed a response in support of the petitions for writs of certiorari and motion for expedited consideration, which were granted by the Court on March 6, 1972. As indicated

by letters contemporaneously filed with such response, Texas Eastern Transmission Corporation obtained the consent of the Federal Power Commission (FPC) and United Gas Pipe Line Company (United) to the filing of an *amicus curiae* brief. No response was received from Louisiana Power & Light Company (LP&L) and we can only assume that it does not consent.[1]

Pipeline Intervenors own and operate major natural gas transmission systems through which gas is transported for ultimate distribution to millions of consumers in virtually every state east of the Mississippi River. United is a major supplier of gas to each of the Pipeline Intervenors. Since November 1, 1970, United has been curtailing deliveries to Pipeline Intervenors and to its other customers, including direct industrial customers such as LP&L. Pipeline Intervenors have a vital interest in the outcome of this case because the injunctive relief sought by LP&L would require United to increase its curtailment of deliveries to Pipeline Intervenors and other customers in order to supply the full requirements of LP&L.

It is the position of Pipeline Intervenors that the Court should reverse the decision of the United States Court of Appeals for the Fifth Circuit holding that the FPC has no curtailment jurisdiction over deliveries of natural gas transported in interstate commerce by an interstate pipeline company to direct industrial customers. However, assuming *arguendo* that this Court should agree with the Fifth Circuit on this point, the Fifth Circuit's decision still must be reversed because such decision, as was the District Court's, was rendered without the joinder of indispensable parties in accordance with Rule 19(a) of the Federal Rules of Civil

[1] In this connection, Pipeline Intervenors have been informed that LP&L refused to consent to the filing of an *amicus curiae* brief by Brooklyn Union Gas Company, which is a distribution company customer of Texas Eastern.

Procedure, 28 U.S.C. Rule 19(a). Because the question of indispensable parties has not been raised or briefed by any of the parties in the court below, we assume that it will not be presented in briefs filed by such parties before this Court. Moreover, it should be noted that this is a question that can and should be raised by this Court on its own motion. *Hoe et al* v. *Wilson*, 9 Wall. 501, 503-4, 19 L.Ed. 762-3 (1869); *Minnesota* v. *Northern Securities*, 184 U.S. 199, 235 (1902). If our argument on this point is accepted, then even if the Court should agree with the Fifth Circuit on the question of the Commission's jurisdiction under the Natural Gas Act, the Fifth Circuit's decision would still have to be reversed.

WHEREFORE, Pipeline Intervenors respectfully request leave to file a brief *amicus curiae* in this case on the issue of the absence of indispensable parties.

Respectfully submitted,

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Counsel for Texas Eastern Transmission Corporation

IN THE

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LOUISIANA POWER & LIGHT COMPANY,
Respondent.

BRIEF AMICUS CURIAE OF PIPELINE INTERVENORS

It is the primary position of Pipeline Intervenors that this Court should reverse the decision in *Louisiana Power & Light Company* v. *United Gas Pipe Line Company et al.* (No. 71-2550) where the Court of Appeals for the Fifth Circuit held that the Federal Power Commission (FPC) has no curtailment jurisdiction over deliveries of natural gas transported in interstate commerce by an interstate pipeline company to direct industrial customers such as Louisiana Power & Light Company (LP&L). Pipeline Intervenors believe that the reasons in support of their primary position will be adequately presented in the briefs filed by the FPC and United Gas Pipe Line Company

(United). However, in the event this Court should not overrule the limitation which the Fifth Circuit has imposed upon the FPC's curtailment authority under the Natural Gas Act, 15 U.S.C. 717 et seq., then for the reasons set forth below Pipeline Intervenors submit that the Fifth Circuit's decision still must be reversed because such decision, as was the District Court's, was rendered without the joinder of indispensable parties, i.e., Pipeline Intervenors and the other customers of United whose rights and interests would be seriously and permanently affected if the injunctive relief sought by LP&L were granted.

1.

As early as 1827 this Court recognized that no court can directly adjudicate upon the rights of persons without such persons being actually or constructively before it. *Mallow* v. *Hinde*, 12 Wheat. 193, 198. 6 L.Ed 599, 600(1827). This basic premise underlies the requirement that a court of equity must dismiss a complaint if the plaintiff fails to join all indispensable parties. Thus in *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 235 (1902), this Court stated:

> "The general rule in equity, is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the Court is enabled to make a complete decree between the parties to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a partial view only of the real merits.
>
> "The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter who are not

made parties to this suit, is founded upon clear reasons, and may be enforced by the Court, *sua sponte*, though not raised by the pleadings or suggested by the Counsel."

Therefore, the controlling question underlying the argument urged in this brief is whether Pipeline Intervenors and United's other customers are indispensable parties with respect to the injunctive action filed by LP&L. If so, their joinder is absolutely, not conditionally, necessary. *California* v. *Southern Pac. Co.*, 157 U.S. 229 (1894); *State of Texas* v. *Interstate Commerce Commission*, 258 U.S. 158 (1922). This is true even though certain of these customers cannot be joined without defeating LP&L's claim to federal jurisdiction predicated upon the diversity between LP&L and United and its parent, Pennzoil United, Inc.[1] (Moore's) *Federal Practice*, Vol. 3A § § 19.05, 19.07 (2d ed. 1970).

2/

Although there is "no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not",[2] the test most often cited and relied upon is set forth in *Shields* v. *Barrow*, 17 How. 129, 141 (1854) where this Court defined indispensable parties as:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

---

[1] LP&L is incorporated under the laws of the State of Florida and has its principal place of business in the State of Louisiana. United and Pennzoil are incorporated under the laws of the State of Delaware and have their principal place of business in the State of Texas. The joinder of Pipeline Intervenors would not defeat diversity jurisdiction because they are each incorporated under the laws of the State of Delaware and have their principal place of business in states other than Louisiana.

[2] *Niles-Bement-Pond Co.* v. *Iron Moulder's Union*, 254 U.S. 77, 80 (1920)

In other words, "where a person will be directly affected by a decree, he is an indispensable party . . .". *Williams* v. *Bankhead*, 19 Wall. 563, 571 (1874).

In the present case, the rights of Pipeline Intervenors and United's other customers will be directly and adversely affected by a decree granting the relief sought by LP&L. Since the limited supply of gas available to United is not sufficient to meet the requirements of all its customers, United has been required to allocate deliveries among such customers. The injunction sought by LP&L would require United to supply LP&L with substantially greater volumes of gas than United has heretofore supplied in accordance with curtailment plans on file with the FPC. It is readily apparent "that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter who were not made parties to [the] suit"[3] because in order to supply greater volumes of gas to LP&L, United would necessarily be required to increase its curtailment of deliveries to Pipeline Intervenors and its other customers.

Although LP&L may argue that the suit which it has filed only involves a contract dispute between United and LP&L alone, the controversy is not and cannot be limited to the gas requirements of LP&L but, of necessity, reaches and affects all of United's customers. This is true not only because of the actual impact of granting the injunctive relief sought by LP&L as discussed above, but also because the operation of the contract provisions[4] on which LP&L relies require a determination of the gas requirements of all of United's customers.

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[3] *Minnesota* v. *Northern Securities*, 184 U.S. at 235 (1902).

[4] These contract provisions entitled "Impairment of Deliveries" are printed in Appendix A hereto.

3.

Parties have been held to be indispensable because their "rights . . . are so entangled with one another that it is practically impossible in the decree to protect those who are absent[5]" and because the decree would be of "immediate concern" to them.[6] However, the case most squarely in point with the present fact situation is *Commonwealth Trust Co.* v. *Smith*, 266 U.S. 152 (1924) which involved a suit to foreclose a lien on water rights and lands two settlers had contracted to purchase. These water rights had been obtained by a private corporation from the State of Idaho and then had been sold to a multitude of settlers under separate contracts. At the time of the suit there was an insufficient supply of available water to satisfy the water-right contracts which had been entered into covering 73,000 acres. The defendants moved to dismiss claiming that the other holders of water-right contracts were necessary parties. The district court dismissed the action because of the plaintiff's refusal to join the other holders of water-right contracts, and its decision was upheld by the court of appeals. In affirming the lower courts, this Court noted, *inter alia*:

> ". . . as the bill was dismissed because of the refusal to bring in additional parties, the only question open here is whether the parties indicated were necessary parties. Of course they were, if they had such an interest in the matter in controversy that it could not be determined without either affecting that interest or leaving the interests of those who were before the court in a situation that might be embarrassing and inconsistent with equity. *Shields* v. *Barrow*, 17 How. 130, 139.

---

[5] *Roos* v. *Texas Co.*, 23 F.2d 171, 173 (2nd Cir. 1927), *cert. den.* 277 U.S. 587 (1928).

[6] In *State of Texas* v. *Interstate Commerce Commission*, 258 U.S. 158 (1922) suit was brought by the State against the ICC to have its ruling on wages declared unconstitutional and employers and employees who were operating under the rulings were held indispensable because the decree would be of "immediate concern" to them.

"The plaintiff takes the position that the suit is simply one to foreclose a distinct lien on particular water rights and lands, in which the other holders of water-right contracts have no interest, and that a final decree determining the issues in the plaintiff's favor and granting the relief sought can neither affect the the other holders of such contracts nor work any embarrassment or inequity to the defendants. In our opinion that position is not tenable. The suit is much more than one for a simple foreclosure. The bill sets forth the controversy respecting the water supply and does so for the purpose of having it determined. The controversy is not peculiar to the contracts sued on but reaches and affects all that are outstanding. The contracts, while several in form, are interdependent in substance and operation: All are effectively tied together by the contract between the State and the company, in virtue of which they were made, and by what they purport to do, which is to entitle their holders to participate on equal terms in the use of a common supply of water and to invest them with proportionate interests in the works by which the water is collected and conducted to the places of use. As was well said by the District Judge,

> "'In a very substantial sense all the settlers are parties to one general contract, in the subject matter of which all are interested and by virtue of which all have rights so interdependent, whether they be regarded as joint or several, that the interest of one cannot be defined and adjudicated without affecting the interests of all others.' (266 U.S. at 159-60).
>
> * * *
>
> ". . . In short, the interests of the contract holders are so related that an effective and just determination of the questions can only be had in a proceeding to which all are parties." (266 U.S. at 161).

Here, LP&L has a contract to purchase gas from United. So do Pipeline Intervenors and United's other customers:

But United does not have sufficient gas to meet all their contract requirements. Therefore, under the rationale of *Commonwealth Trust,* Pipeline Intervenors and United's other customers have such an interest in the matters at controversy in LP&L's suit, that it cannot be determined without either affecting their interest or leaving the interest of those who are before the Court in a situation that is embarrassing and inconsistent with equity. *Shields* v. *Barrow, supra.* The interest of all of United's customers are so closely related that an effective and just determination of the matters in controversy can only be had in a proceeding to which all customers are parties.

4.

The fact that the question of indispensable parties was not raised by the pleadings or suggested by counsel in the courts below is no impediment to the consideration of such question by this Court because the duty of a court to raise the question of indispensable parties on its own motion is well settled. Thus, in *Hoe et al* v. *Wilson,* 9 Wall. 501, 19 L.Ed. 762 (1869), Justice Swain said (9 Wall. at 503, 504, 19 L.Ed. 763):

> "But Zephania Jones, the Complainant in the suit in which the decree of sale was made, and the other heirs-at-law of Ann R. Dermott, are indispensable parties. No relief can be given in the case before us which will not seriously and permanently affect their rights and interests. According to the settled rules of equity jurisprudence the case cannot proceed without their presence before the Court. The objection was not taken by the defendant, but the Court should, *sua sponte,* have caused the bill to be properly amended, or have dismissed it, if the Amendment were not made. Instead of this being done, the cause was heard and decided upon its merits. This was manifest error."

CONCLUSION

For the foregoing reasons, Pipeline Intervenors urge this Court to overrule the Fifth Circuit and hold that the FPC has curtailment jurisdiction over deliveries of natural gas transported in interstate commeree by an interstate pipeline company to direct industrial customers such as LP&L. However, in the event that this Court should determine that the FPC has no such curtailment authority, then Pipeline Intervenors urge the Court to reverse the Fifth Circuit's decision for the reasons which are set forth in this brief.

Respectfully submitted,

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APPENDIX A

Excerpts from Contracts Between United Gas Pipe Line Company and Louisiana Power & Light Company

A. Agreement dated February 20, 1956 covering gas for the Sterlington Station:

"Article IX

"Impairment of Deliveries

"In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers."

B. Agreement dated May 6, 1968 covering gas for the Nine Mile Point Station:

"Article IX

"Impairment of Deliveries

"Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, when it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers."

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In The Supreme Court of the United States

OCTOBER TERM, 1971

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v.

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On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

---

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On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

BRIEF OF UNITED AND PENNZOIL

OPINIONS BELOW

The opinion of the court of appeals (United Pet. App. A, at 1a) is not yet reported. The opinion of the district court (A. 256; United Pet. App. C, at 30a) is reported at 332 F.Supp. 692.

JURISDICTION

The judgment of the court of appeals (United Pet. App. B, at 28a) was entered on January 14, 1972. The petitions in 71-1016 and 71-1040 were filed on February 7, 1972, and February 14, 1972, respectively. The petitions were granted March 6, 1972 (A. 273). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in times of emergency, the Federal Power Commission has authority under the Natural Gas Act to accept, approve or modify a plan of an interstate pipeline for the curtailment of natural gas deliveries to both direct-sale and resale customers.[1]

2. Whether an appellate court should, in a collateral proceeding, determine the Federal Power Commission's jurisdiction over facilities being operated by an interstate pipeline when that issue is then being litigated before the Commission.

STATUTES INVOLVED

The statutory provisions involved (United Pet. App. D, at 43a) are Sections 1(b), 4, 5, 7, 16 and 19(b) of the Natural Gas Act (Act), as amended, 15 U.S.C. §§ 717(b), 717c, 717d, 717f, 717*o*, 717r(b) (1970).[2]

STATEMENT

This country faces a national energy crisis of mammoth proportions caused by the current industry-wide shortage of natural gas. A Federal Power Commission (FPC) staff report recently issued shows that this shortage will increase sharply in the coming years.[3] On March 2, 1972, the Chairman of the President's Oil Policy Committee testified before the Senate Committee on Interior and Insular Affairs that it will be necessary to ration gas on an end-

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[1] Direct-sale customers are customers who consume the gas purchased from United. Resale customers are customers who sell gas purchased from United to others, and include gas distribution companies and other pipelines.

[2] Act of June 21, 1938, 52 Stat. 821-24, 830-31.

[3] FPC, Staff Report No. 2: National Gas Supply and Demand 1971-1990 (February 1972).

use basis if present trends continue.[4] In the face of this crisis the court below held that the FPC is powerless to permit United to curtail deliveries to direct industrial users so as to insure adequate supplies for domestic consumptive use.

United Gas Pipe Line Co. (United), a jurisdictional pipeline,[5] is a major supplier of gas to jurisdictional pipelines supplying much of the gas used in the eastern half of the United States (FPC Pet. App. F, at 95a). All of United's sales, service and facilities, except some of those in its Victoria and New Orleans Divisions, have been certificated by the FPC pursuant to Section 7 of the Act (A. 173; R. 284). An application to certificate all of United's uncertificated sales, service and facilities is presently pending in a Section 7 certificate proceeding before the FPC (A. 173; R. 284-85). *United Gas Pipe Line Co.*, FPC Docket No. CP 71-89.[6]

Since November 1, 1970, United has been responding to the gas shortage by curtailing industrial gas deliveries to both direct and resale customers pursuant to plans filed in curtailment proceedings before the FPC.

On March 31, 1971, while the FPC was conducting hearings concerning United's curtailment plan, Louisiana Power & Light Company (LPL), one of United's direct-sale customers and a party to both the curtailment and certificate proceedings (A. 140-41, 154; R. 228-29, 251), filed a suit

---

[4] Testimony of Gen. George A. Lincoln, Director of the Office of Emergency Preparedness, March 2, 1972.

[5] "Jurisdictional pipeline" means a pipeline which is subject to the jurisdiction of the FPC as a result of the transportation or sale for resale of natural gas in interstate commerce.

[6] On February 9, 1972, the FPC found that all of United's uncertificated sales, service and facilities are subject to FPC jurisdiction. *United Gas Pipe Line Co.*, FPC Docket No. CP71-89 (Opinion No. 610, February 9, 1972) (United Pet. App. F, at 91a).

collaterally attacking the FPC's jurisdiction to conduct both proceedings. Basing jurisdiction in the district court on 28 U.S.C. § 1332 because of diversity of citizenship, LPL claimed United's curtailment plan was a breach of its contracts with LPL and asked for an injunction against curtailment of deliveries to it pursuant to the plan (A. 11; R. 14).

On June 30, 1971, LPL's suit was dismissed for lack of jurisdiction (A. 266; R. 437). The district court held that the FPC proceeding in which United's curtailment plans had been filed was well within the FPC's jurisdiction and that LPL was required to exhaust its administrative remedies in that proceeding and the related[7] certificate proceeding (A. 256-66; R. 422-37).[8]

The court of appeals reversed. It held that the FPC has no jurisdiction to regulate curtailment of deliveries to direct industrial users, reasoning that once a direct sale is certificated pursuant to Section 7 of the Act, it may not

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[7] The curtailment and certificate proceedings are related because the FPC opinion finding curtailment jurisdiction, *United Gas Pipe Line Co.*, FPC Docket Nos. RP71-29, RP71-120, RP71-99 (Opinion 606, October 5, 1971), made clear that if the facilities for which certificates have been requested in the certificate proceeding are interstate in character and subject to FPC jurisdiction, the FPC ruling in the curtailment proceeding concerning the FPC's jurisdiction over curtailment programs will apply to volumes transported through those presently uncertificated facilities (United Pet. App. E, at 60a).

[8] This was the second dismissal for lack of jurisdiction. Also relying on the exhaustion doctrine, Judge Dawkins first dismissed the case on April 29, 1971, after considering briefs and after having heard argument from LPL on two occasions in connection with its request for a temporary restraining order (A. 116; R. 187-88). On May 14, 1971 an administrative panel of the Fifth Circuit vacated the judgment of dismissal, reinstated the restraining order which had been dissolved by the trial court and remanded the case for an evidentiary hearing on the jurisdictional issue and on such other preliminary issues as might properly be raised (A. 119-21; R. 192-96). Judge Dawkins at the request of LPL, then recused himself and the case was reassigned to Judge Scott.

be further regulated short of an FPC abandonment order (United Pet. App. A, at 22a). The court of appeals further held that the FPC has no regulatory jurisdiction over United's New Orleans District, reasoning that the flow of gas through that District is, in its view, essentially intrastate rather than interstate (United Pet. App. A, at 25a). The district court finding that the FPC's expertise was necessary for the proper consideration of such issues was disregarded (United Pet. App. A, at 23a).

SUMMARY OF ARGUMENT

Not having enough gas to meet both industrial boiler fuel needs and the needs of domestic consumers, United and many other interstate pipelines have found it necessary to file curtailment plans with the FPC. In curtailment proceedings under Sections 4 and 5 of the Natural Gas Act, the FPC, as it did after World War II, has been attempting to protect small consumers by permitting these interstate pipelines to curtail industrial deliveries to both direct and resale customers.

In its opinion and order dealing with United's curtailment plan (Opinion 606), the FPC ruled that it has the authority in connection with its action on pipeline curtailment plans to allocate the interstate gas supplies of a jurisdictional pipeline among all that pipeline's customers, despite the fact that it has no rate jurisdiction over direct industrial sales. The court below, in a collateral proceeding, has held that the FPC does not have such jurisdiction. The court below also held that the FPC has no regulatory jurisdiction over United's New Orleans District and thereby deprived the FPC of the opportunity to make the initial determination of its jurisdiction over those facilities.[9]

---

[9] The FPC has since determined that these facilities are jurisdictional. *See* note 6, *supra*.

United contends that the FPC curtailment ruling, rather than the decision of the court below, is correct and that, in light of the doctrine of exhaustion of administrative remedies, the court below improperly predetermined the FPC's jurisdiction over United's New Orleans District.

A

Section 1(b) of the Natural Gas Act gives the FPC plenary authority over interstate transportation. Curtailment is a matter of service interruption and thus is largely related to transportation, *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n*, 332 U.S. 507 (1947); as such, the problem of curtailments is clearly within the FPC's jurisdiction to regulate. Since Congress, by the passage of the Natural Gas Act, intended that there be a comprehensive and effective regulatory scheme, the inability of state agencies and individual courts to protect consumers in shortage situations confirms the FPC's curtailment jurisdiction. In addition, the FPC authority over curtailments is inherent in the FPC's obligation under Sections 4 and 5 to prevent unreasonable preferences or discriminations in service and its general powers under Section 16 to perform all acts necessary to discharge its statutory responsibilities. The FPC's curtailment authority is in no way limited by Section 7 of the Act since its transportation jurisdiction under Section 1(b) and its duty to prevent discrimination in service under Sections 4 and 5 exist independently of its certification and abandonment authority under Section 7.

B

LPL's claim that United's New Orleans District is a local system not subject to FPC regulation does not relieve LPL of the requirement that it exhaust its administrative rem-

edies in the FPC certificate proceedings. The court below should not have predetermined the FPC's certificate jurisdiction since Congress intended that FPC jurisdictional questions be reviewed by the court of appeals only in Section 19(b) review proceedings. The requirement of initial agency determination and review pursuant to Section 19(b) is particularly compelling when the jurisdictional result depends on analysis of a complicated factual picture and application of specialized legal concepts, based upon a full evidentiary record. In any case, the court of appeals based its holding upon a *de minimis* rationale which has been expressly rejected by this Court.

ARGUMENT

I. The FPC Has Curtailment Authority Over Deliveries To A Jurisdictional Pipeline's Direct Industrial Customers.

A. Section 1(b) Of The Act Gives The FPC Plenary Authority Over The Transportation Of Natural Gas In Interstate Commerce.

The language of Section 1(b) is clear and unambiguous; it states:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . . and to natural gas companies engaged in such transportation or sale. . . ." 15 U.S.C. § 717(b).

This Court has held that Section 1(b) gives the FPC regulatory authority over (1) transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n*, 332 U. S. 507 (1947). Although Congress limited the FPC's jurisdiction over *sales* to sales for resale, Congress in Section 1(b) gave the FPC unlimited jurisdiction over the *transportation* of all gas in interstate commerce, and over *companies* engaging in *such transportation.*

In *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 473 (1950), this Court reaffirmed the view, expressed three years earlier in the 1947 *Panhandle* decision, that Section 1(b) contains three discrete grants of jurisdiction by holding that East Ohio Gas was a "natural gas company" subject to the FPC's accounting regulations because it was engaged in the transportation of natural gas in interstate commerce, despite the fact that East Ohio Gas made only direct sales which were not subject to Commission rate regulation.

In reality, the court of appeals did not challenge the independent status of FPC transportation jurisdiction. Rather, the court of appeals seemed to think that the exercise of that transportation jurisdiction was somehow inconsistent with the Section 1(b) exemption of direct sales from FPC rate jurisdiction (United Pet., App. A, at 21a). The deficiency of this analysis is manifest in the decisions of this Court.

In *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) (*Transco*), the pipeline argued that the FPC could not consider the price factor in deciding whether or not to certificate a direct industrial sale because the FPC had no rate jurisdiction over direct sales. Characterizing the pipeline's argument as overly broad, 365 U.S. 1, 26, this Court observed that it had on several occasions rejected similar arguments. By way of example this Court, in *Transco*, referred to its holding in *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581 (1945), that the FPC could, in connection with fixing a pipeline's resale rates, take into account the value of the pipeline company's production and gathering facilities even though Section 1(b) exempts such facilities from FPC jurisdiction. As noted in *Transco*, in reaching the *Colorado Interstate* result, this Court rejected the argument that to include

the value of production and gathering facilities in a rate base was to regulate the production and gathering of natural gas contrary to the provisions of Section 1(b).

This Court concluded its disposition of the pipeline's argument by referring, 365 U.S. 1, 26, to its statement in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 325 U.S. 635, 646, (1945), to the effect that the FPC may take direct industrial rates into consideration when it fixes resale rates despite the fact that it has no jurisdiction over direct-sale rates.

Thus the fact that the FPC lacks rate jurisdiction over direct industral sales in no way limits the reach of the FPC's powers in discharging its obligations to regulate interstate transportation and the companies doing the transporting. The language of Section 1(b) and the decisions construing that language compel the conclusion that the separate grant of transportation jurisdiction gives the FPC the plenary authority over curtailment plans which it has asserted in Opinion 606.[10]

This independent grant of transportation authority is obviously what this Court had in mind when, in *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n, supra,* it said with respect to direct sales:

> "... [T]he matter of interrupting service is one largely related ... to transportation and thus within the jurisdiction of the Federal Power Commission to control,

[10] *United Gas Pipe Line Co.*, FPC Docket Nos. RP71-29, RP71-120, RP71-99 (Opinion 606, October 5, 1971) (United Pet. App. E, at 55a). On March 6, 1972, this Court denied United's petition for a writ of certiorari to review Opinion 606 prior to judgment in the court of appeals. Accordingly, the six review proceedings instituted pursuant to Section 19(b) of the Act are still pending in the court of appeals. By orders entered on January 28, 1972, and February 16, 1972, the court of appeals has consolidated these six proceedings; the lead case is *Louisiana Power & Light Co., et al.* v. *Federal Power Comm'n*, No. 71-3429 (5th Cir., filed December 3, 1971).

in accommodation of any conflicting interests among various states." 332 U.S. 507, 523.

This view, in light of the current shortage, is more important today than it was 25 years ago.

B. Unless The FPC Has Curtailment Jurisdiction Over Industrial Gas There Can Be No Comprehensive And Effective Regulation Of Curtailment.

In *Transco, supra*, this Court stated:

". . . Congress did not desire an 'attractive gap' in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource. Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation. See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 232 F. 2d 467." 365 U.S. 1, 28.

State regulatory agencies cannot deal effectively with the problems of service priorities created by an interstate pipeline's systemwide gas shortage. Indeed, state agencies face insurmountable obstacles; both practical and legal.

The natural gas transmission industry involves a vast interstate network of interconnected transmission lines (FPC Pet. App. H, at 93a). Most of these pipelines make some direct sales (FPC Pet. App. I, 95a). No state commission, even if it had jurisdiction over industrial sales within its borders, could regulate curtailments on a systemwide basis. Thus no state agency could insure that curtailment plans will prefer domestic needs over industrial boiler fuel requirements and thereby forge the complete, per-

manent and effective bond of protection to consumers for which the Act was framed. *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 147 (1960).

Aside from the inability of state regulatory agencies to regulate curtailments on a systemwide basis, other practical problems exist. A gas-producing state with growing industrial needs has a natural tendency to give those needs a high priority. For example, the Louisiana Public Service Commission instituted two proceedings against United for this express purpose,[11] and following the court of appeals decision in this case, filed suit against United and the FPC in furtherance of that purpose. *LPSC* v. *United Gas Pipe Line Co., et al.*, Civ. No. 17,631 (W.D. La., filed February 23, 1972).[12]

And even if a state agency's order increasing industrial deliveries within that state's borders were founded on reasons other than its desire to fuel industrial growth at the expense of consumers in other states, the resulting burden on interstate commerce would violate the commerce clause of the United States Constitution. *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *The Minnesota Rate Cases*, 230 U.S. 352, 381, 396-97, 400 (1913).

Nor can courts be expected to do the job. In *Atlanta Gas Light Co., et al.* v. *Southern Natural Gas Co., et al.*, Civ. No. 16060 (N.D. Ga., February 11, 1972), the court, in

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[11] *United Gas Pipe Line Co.*, LPSC Docket No. 11009 (Special Order 7-71, September 28, 1971); *Louisiana Intrastate Gas Corp., et al.*, LPSC Docket No. 11010 (General Order, September 30, 1971).

[12] The suit seeks an injunction to prevent United and the FPC from treating United's New Orleans District as a part of its interstate system. The immediate effect of the suit would be to remove direct-sale gas deliveries made through the facilities of the New Orleans District from FPC curtailment jurisdiction.

dismissing a suit similar to the one filed by LPL except involving sales for resale, noted:

> "At this time the FPC is the proper and only forum for a gas allocation determination—any different conclusion would lead to a chaotic situation since, for example, a court in Mississippi could determine what gas consumers should receive in that state while, at the same time, an Alabama court was trying to protect Alabama consumers of gas. If that kind of situation were allowed, certainly all of Southern Natural's customers in other states would begin the race to the courthouse. Then which would Southern Natural obey—more importantly, where would Southern Natural get the gas to meet all the mandates of the various courts?"[13]

Finally, one must not lose sight of the fact that depriving the FPC of jurisdiction over United's deliveries to LPL leaves those deliveries totally unregulated since the Loui-

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[13] A similar concern was voiced by the House Committee on Interstate and Foreign Commerce in 1947 in its consideration of a proposed amendment to the Act which would have expressly conferred upon the states regulatory authority over direct sales. In explaining its conclusion that such an amendment would not be in the public interest the House Commerce Committee stated:

> "Your committee feels that to alter the present situation would present a chaotic situation. If the States were given jurisdiction over direct sales by a pipe line traversing several States, it would be under a dual system of control by the Federal Power Commission and the States. There is no assurance of uniformity of treatment by the different states. The power to regulate direct sales would include the power of curtailment and interruption of service. The different States would conceivably have different views on the matter of curtailment and interruption regardless of its effect on the needs for gas in other States. Curtailment and interruption of service concerns more than one State and endless confusion and conflict would arise between different States demanding gas as between States and the pipe lines. Also it is conceivable that conflicts would arise between the Federal Power Commission jurisdiction as against the demands of the States to regulate prices, to interrupt service and to curtail service." H.R. REP. No. 800, 80th Cong., 1st Sess. 10-11 (1947).

siana Public Service Commission is constitutionally prohibited from exercising jurisdiction over any aspect of an industrial sale. LA. CONST. art. 6, § 4.

Recognition of these circumstances, in light of the Congressional purpose to effect a comprehensive regulatory scheme, is not to argue, as the court of appeals suggests, that need alone can create federal agency power (United Pet., App. A, at 16a). Rather, the argument demonstrates that Congress intended federal regulation of curtailment because the problem is one with which state agencies and individual courts cannot be expected to deal.

C. FPC Authority Over Curtailments Is Inherent In Other Powers Granted By The Act.

The Congressional plan for federal regulation of the gas transmission industry is apparent from the structure of the Act. First, Congress made clear in Section 1(b) that it intended to regulate (1) all interstate transportation of gas and (2) the companies engaged in either interstate transportation or in sales for resale of gas in interstate commerce. Then, Congress took two principal approaches to effectuate its regulatory purpose. It (1) proscribed certain activity by jurisdictional pipelines in Sections 4 and 7 and (2) granted authority to the FPC in Sections 5, 7 and 16 to see that the standards of conduct laid down for jurisdictional pipelines were observed.

In Section 4(b) jurisdictional pipelines were told:

> "No natural-gas company shall, with respect to any transportation **or** sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any **undue** preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in

rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 15 U.S.C. § 717c(b). (Emphasis supplied.)

Further in Section 7(c) jurisdictional pipelines were told:

> "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." 15 U.S.C. § 717f(c).

In addition jurisdictional pipelines were told in Section 7(b) that they may not abandon any jurisdictional facilities or any service rendered by means of those facilities without Commission approval.

In Section 5(a) the FPC was told:

> Whenever the Commission . . . shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . ." 15 U.S.C. § 717d(a).

In addition to these duties, and the duties imposed on the FPC in Section 7 in connection with initial certification and

abandonment, Congress gave the FPC further broad powers in Section 16:

> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. . . ." 15 U.S.C. § 717*o*.

Just as Section 1(b) declares that the FPC has regulatory authority over both transportation and sales for resale, Sections 4 and 5 cover transportation *or* sale, service *and* rates.

Thus the argument that the Commission has no curtailment jurisdiction over industrial gas is an argument that the FPC, despite the prohibitions of Section 4 and the authority granted in Section 5, is powerless to prevent the undue preference and advantage which industrial customers will receive over domestic users if substantial industrial volumes are burned up under boilers during times of shortage. This argument was rejected by the Sixth Circuit in *Michigan Consolidated Gas Co* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (6th Cir. 1949) when it observed:

> "If the Commission has no authority to order adequate service to customers, in view of all the conditions and circumstances involved, the basic purpose of the Natural Gas Act fails of realization. We can attribute to the Congress no purpose to withhold from the Commission control over services. The power to prevent preferences and discrimination both as between individuals and classes, carried with it by necessary and inescapable implication, authority to regulate service." 173 F.2d 784, 789.

The attempt of the court below to distinguish this case on the ground that it involved a dispute between a pipeline and a resale customer will not stand examination. Although

its description of the parties is accurate, the court below failed to perceive that the Sixth Circuit's holding was based on the FPC's broad authority to prevent discriminations and was in no way based on the fact that Michigan Consolidated was a resale customer.

Likewise the Section 7 argument advanced by LPL and adopted by the court of appeals (United Pet. App. A, at 22a) is not persuasive. The court of appeals recognized that the FPC has the power under Section 7(c) to refuse to permit an industrial sale to be made in the first place and further power under Section 7(b) to order the abandonment of that sale. However, the court held that the FPC is powerless to order a temporary reduction in deliveries to direct customers in order to respond to an emergency created by a systemwide shortage of gas. In the court of appeals' view the FPC may respond to such a crisis only through abandonment proceedings under Section 7(b).

This result ignores the uniform holdings in rate and abandonment contexts that the FPC's exercise of jurisdiction granted by Section 1(b) is in no way dependent upon a certificate having been issued or even upon an application for a certificate having been filed. *Sun Oil* v. *FPC*, 281 F.2d 275 (5th Cir. 1960) (rate); *Magnolia Petroleum Co.* v. *FPC*, 226 F.2d 234 (5th Cir. 1959), *cert. denied sub nom.*, *Socony Mobil Oil Co.* v. *FPC*, 363 U.S. 842 (1960) (rate); *J. M. Huber Corp.* v. *FPC*, 236 F.2d 550, 556-57 (3d Cir. 1956), *cert. denied*, 352 U.S. 971 (1957) (abandonment). If the power to set rates and order abandonment may be exercised when no certificate has been issued, or even applied for, it is clear that curtailment authority exists independently of certificate status. It would be a curious result indeed to read the Act so as to give the FPC less power over a jurisdictional pipeline which has complied

with the Section 7 certificate requirements than it has over pipelines which have failed to comply with Section 7, or to conclude that an act which empowers the FPC to deny service altogether or to order its total and complete abandonment does not contain authority for the FPC to regulate curtailments during periods of shortage.

The result also has serious practical consequences. When a shortage arises it is imperative that a system of priorities be promptly imposed so that both the pipeline and its customers will know the delivery priorities. By requiring pipelines to file plans under Section 4 of the Act, as it did in Order 431,[14] the FPC can insure that consumers are protected as soon as the shortage arises. Section 7(b) abandonment proceedings do not have this inherent flexibility.

The FPC has broad authority under Sections 5 and 16 to prevent a jurisdictional pipeline from granting an undue preference or advantage to a particular class of service. That jurisdiction is in no way dependent on Section 7; indeed limiting its exercise to abandonment proceedings under Section 7(b) would effectively destroy the FPC's ability to prevent preferences in curtailment situations when total abandonment of service is not required.

D. The FPC Has Exercised Curtailment Authority Over Direct Sales In Previous Shortage Situations.

As the FPC noted in Opinion 606 (United Pet. App. E, at 65a), curtailment situations are not new. Following World War II, the FPC required Panhandle Eastern Pipe Line Company to file rules and regulations governing curtailment and interruption of gas service. These rules, which were initially imposed by agreement between Panhandle and its customers, *City of Detroit v. Panhandle Eastern Pipe Line Co.*, 5 FPC 983 (1946), affected both direct and resale customers. The following year, when

[14] FPC Docket No. R-418 (April 15, 1971) (FPC Ex. 20; A. 239; R. 401).

voluntary agreements could not be reached, the FPC imposed similar rules without the consent of the parties. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196 (1947).

In cases arising out of the FPC's issuance of the Panhandle curtailment orders, the lower courts repeatedly upheld the FPC's authority in curtailment situations.[15] Although these cases are not controlling, they reflect a long-standing interpretation of the Act by both the FPC and the lower courts which is entitled to considerable weight. *Boehm* v. *Commissioner*, 326 U.S. 287, 292 (1945); *United States* v. *American Trucking Ass'n, Inc.*, 310 U.S. 534 (1940); *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 84 (1932); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F.2d 467, 471 (3d Cir.), *cert. denied*, 352 U.S. 891 (1956).

In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court stated:

> ". . . the width of administrative authority must be measured in part by the purposes for which it was conferred . . . . Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." 390 U.S. 747, 776.

The FPC has broad authority over transportation and heavy responsibility to prevent discrimination by jurisdictional pipelines. Since only the FPC can effectively regulate curtailments, surely the FPC's broad responsibilities demand a generous construction of its authority in favor of direct-sale curtailment jurisdiction.

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[15] *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 226 F.2d 60, 79 (6th Cir. 1955), *cert. denied*, 350 U.S. 987 (1956); *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942 (6th Cir. 1949); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 80 F. Supp. 27, 30 (E.D. Mich. 1948), *aff'd*, 173 F.2d 784 (6th Cir. 1949).

II. The FPC's Jurisdiction Over United's New Orleans District Can Be Determined Initially Only By The Commission And Reviewed Only By Petition To Review Under Section 19(b) Of The Act.

A. LPL's Claim That United's New Orleans District Is A Local System Not Subject To FPC Regulation Does Not Relieve It Of The Requirement That It Exhaust Its Administrative Remedies In The Certificate Proceeding.

It has been settled since this Court's decisions in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and *FPC* v. *Arkansas Power & Light Co.*, 330 U.S. 802, *rev'g mem.* 156 F.2d 821 (D.C. Cir. 1946), that a party may not bypass an agency proceeding merely because the party claims that the agency lacks jurisdiction.

In *Arkansas Power & Light*, the effect of this Court's memorandum decision was to affirm the action of the district court, *Arkansas Power & Light Co.* v. *Federal Power Commission*, 60 F. Supp. 907 (D.D.C. 1945), dismissing a complaint for injunction for lack of subject matter jurisdiction.

In that case, as LPL did here, Arkansas Power & Light sought a declaration that the FPC had no jurisdiction to conduct a proceeding that it was attempting to conduct at the time the complaint for injunction was filed. In disposing of Arkansas Power & Light's claim that an asserted lack of FPC jurisdiction obviated the necessity for exhaustion of administrative remedies, the district court said:

> "If they are allowed to intervene and are aggrieved by an order thereafter issued by the Commission, they may obtain a review of such order as set forth in Sec. 313(b) of the Federal Power Act, supra. If they petition to intervene and their petition is denied, they may ob-

> tain a review of such order denying their petition under Sec. 313(b), supra. Moreover, it should be pointed out that the administrative remedies under the Federal Power Act have not been exhausted, and 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter' Myers v. Bethlehem Shipbuilding Corp., supra [303 U.S. 41, 58 S.Ct. 459,463]; Miles Laboratories v. Federal Trade Commission, supra." 60 F.Supp. 907, 908.

At the time LPL filed its suit the certificate proceeding was pending before the FPC. LPL was a party to that proceeding (A. 154; R. 251) and was contending in that proceeding that the FPC lacked jurisdiction over United's New Orleans District. Thus, the district court action dismissing LPL's complaint on the grounds that the FPC was competent to decide its jurisdiction in that proceeding and that LPL was required to exhaust its administrative remedies was clearly correct; the court of appeals action in deciding (United Pet. App. 8, at 22a-25a) that the Green System (United's New Orleans District) was not subject to FPC regulation was clearly improper.

The court of appeals rejection of the need for agency expertise in the resolution of this jurisdictional controversy is particularly violative of this Court's decision in *McKart* v. *United States*, 395 U.S. 185, (1969):

> "The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decision should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first

> chance to exercise that discretion or to apply that expertise." 395 U.S. 185, 193-94.

This Court's definitive discussion of the exhaustion doctrine in *McKart* illustrates another major deficiency in the court of appeals' decision. In evaluating the factors which normally require application of the exhaustion doctrine, this Court continued:

> "And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages." 395 U.S. 185, 194.

In this connection, although it is true that LPL did not seek an injunction against the certificate proceeding, the judgment of the court below has already disrupted the administrative process. Commissioner Carver suggests in his dissent in the certificate case, *United Gas Pipe Line Co.*, Docket No. CP71-89 (FPC Opinion 610, February 9, 1972) (United Pet. App. F, at 129a), that the court of appeals' decision, until reversed, deprives the FPC of any further authority to act in the certificate proceeding. The Louisiana Public Service Commission's suit against United and the FPC,[16] seeking an injunction against exercise of FPC regulatory jurisdiction over United's New Orleans District, is grounded on the theory that the court of appeals' decision deprives the FPC of jurisdiction. And in the Section 19(b) review proceedings,[17] LPL and the other petitioners in those proceedings argue that United and the FPC are bound under principles of res judicata by the court of appeals judgment in this case.[18]

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[16] *See* note 12, *supra*, and accompanying text.

[17] *See* note 10, *supra*.

[18] *E.g.* Br. LPL 17, *Louisiana Power & Light Co., et al.* v. *FPC*, No. 71-3429 (5th Cir.).

Accordingly, although there has been no injunction against further action in the FPC proceedings, the court of appeals' decision of the jurisdictional issue presented to the FPC in that proceeding clearly violates this Court's command in *McKart*, 395 U.S. 185, 194, that courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction.

In *Arkansas Power & Light*, *McKart* and *Myers* this Court makes clear that the FPC should have been given the opportunity to make the initial determination of its jurisdiction over United's New Orleans District. As this Court observed in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173, 185 (1962), the need for initial agency determination of its jurisdiction is particularly compelling when the jurisdictional issue presented to a court is in the process of litigation before the agency.

B. Congress Intended That FPC Jurisdictional Questions Be Reviewed By The Court Of Appeals Only In Section 19(b) Review Proceedings.

In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), this Court, in the course of construing Section 313(b)[2] of the Federal Power Act, 16 U.S.C. § 825*l*(b), which is substantially identical to Section 19(b) of the Natural Gas Act, stated that Congress, through the Federal Power Act provision:

> ". . . prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders . . . . [and] necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy and all other modes of judicial review." 357 U.S. 320, 336. (Citations and footnotes omitted.)

The lower court decisions construing Section 19(b) of the Act have reached a similar conclusion. *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 209 F.2d 717 (10th Cir. 1953), *rev'd on other grounds*, 348 U.S. 492 (1955); *Algonquin Gas Transmission Co.* v. *Gregory*, 105 F. Supp. 64 (D. Conn. 1952).

These cases are consistent with this Court's holdings in other contexts that when Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems those procedures are to be exclusive. *E.g., Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965).

These decisions mean that under normal circumstances a court must not only give an agency the opportunity to make the initial determination of agency jurisdiction, but must also permit that jurisdictional determination to be reviewed pursuant to the statutory review procedures rather than in a collateral suit.

This principle is particularly applicable to this case. The jurisdictional result in the certificate case depends on a complicated factual analysis of interstate gas flows into and out of the New Orleans District and on the application of the commingling doctrine, *e.g., California* v. *Lo Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965); *Louisiana Public Service Comm'n* v. *Federal Power Comm'n*, 359 F.2d 525 (5th Cir.), *cert. denied*, 385 U.S. 833 (1966). Problems such as these including what the court of appeals described as "simple [gas] flow mechanics" (United Pet., App. A, at 23a) and the legal significance of the factual conclusions, clearly require agency expertise. *Cf. FPC* v. *Florida Power & Light Co.* 40 U.S. L. Week 4141 (1972).

Even a cursory comparison of the court of appeals' analysis of this complicated factual and legal issue (United

Pet., App. A, at 22-25a) with the FPC's analysis (United Pet., App. F at 97a-108a) demonstrates the danger of collateral determination of such jurisdictional issues. In the process of analyzing the incomplete record[19] introduced in the district court for the limited purpose of showing the nature of the issue being considered by the FPC (A. 151-58, 159; R. 246-59, 260), the court of appeals totally ignored the fact that on the 1971-72 peak day over 58 per cent of the gas flowing in United's New Orleans District (589,000 Mcf out of a peak day volume of 1,002,000 Mcf) would be interstate gas (United Ex. 22, Echterhoff Test. 10-11; A. 154, 159; R. 252, 264).

In addition, the court of appeals' characterization of the annual interstate volumes as "minor" (United Pet. App. A, at 22a), when contrasted with the FPC's sophisticated analysis of the *de minimis* contentions advanced in the certificate proceeding (United Pet. App. F, 101a-02a, 107-08a), demonstrates the importance of limiting review of such issues to the Section 19(b) procedures.[20]

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[19] As of the time of the district court hearing the CP71-89 record consisted of 43 pages of testimony and 15 exhibits. Formal hearings did not even begin until June 7, 1971, twelve days after the district court hearing was concluded (A. 1, 2). When the CP71-89 record was closed at the FPC, it consisted of 1,276 pages of transcript, 63 exhibits and 10 items by reference.

[20] When complicated questions of agency jurisdiction are litigated at the agency it is less likely that the reviewing court will be persuaded, as was the court of appeals in this case (United Pet. App. A, at 25a), to adopt theories like the *de minimis* concept discredited by this Court in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 535-36 (1945).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed, and that of the district court, affirmed.

Respectfully submitted,

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Nos. 71-1016 and 71-1040

In the Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., PETITIONERS

v.

LOUISIANA POWER & LIGHT COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.

No. 71-1040

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., PETITIONERS

v.

LOUISIANA POWER & LIGHT COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–27a)[1] is not yet reported. The opinion of the district court (Pet. App. 30a–42a) is reported at 332 F. Supp.

[1] "Pet." references are to the petitions in No. 71-1016; "United Pet." references are to the petitions in No. 71-1040.

692. An earlier order of the court of appeals (Pet. App. 43a–47a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a–29a) was entered on January 14, 1972. The petition for writs of certiorari in No. 71–1016 was filed on February 7, 1972; the petition in No. 71–1040 was filed on February 14, 1972. On March 6, 1972, this Court granted the petitions seeking review of the judgment of the court of appeals (App. 273). The jurisdiction of this Court in both cases is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has jurisdiction under the Natural Gas Act, 15 U.S.C. 717, *et seq.*, to accept, approve, or modify plans for the curtailing of natural gas deliveries by interstate pipelines to direct corporate users in order to effect a fair allocation of natural gas supplies among all ultimate gas consumers, including domestic users, in times of gas shortage.

2. Whether the Federal Power Commission, rather than the courts, should make the initial determination of the Commission's jurisdiction to issue a certificate of public convenience and necessity authorizing a jurisdictional interstate pipeline company to continue to operate certain pipeline facilities.

STATUTES INVOLVED

Sections 1, 4, 5, 7 and 16 of the Natural Gas Act, 15 U.S.C. 717, 717c, 717d, 717f and 717o, are set forth in Appendix A, infra, pp. 41–49.

STATEMENT

These cases involve the jurisdiction of the Federal Power Commission to allocate the gas supply of an interstate natural gas pipeline company when the company's gas supply is insufficient to meet its total contractual commitments. In a proceeding initiated by United Gas Pipe Line Company ("United"), the Commission determined that it had plenary jurisdiction over the curtailment of deliveries of natural gas in interstate commerce to all customers, including direct industrial users, regardless of any contracts with individual customers (Opinion No. 606, Pet. App. 48a–76a; the "curtailment proceeding"). Review of the Commission's determination in the curtailment proceeding is presently pending before the court of appeals.[2]

While the curtailment proceeding was pending before the Commission, Louisiana Power and Light Company ("LP&L") brought this action in the United States District Court for the Western District of Louisiana to enjoin United from curtailing natural gas deliveries to two of LP&L's generating plants. The district court dismissed the suit on the ground that curtailment proceedings are within the Commission's jurisdiction and that LP&L was required to exhaust its administrative remedies prior to seeking judicial relief. The court of appeals reversed, holding that the Commission has no curtailment jurisdiction over deliveries of natural gas transported

[2] On March 6, 1972, this Court denied petitions for writs of certiorari to review the Commission's determination prior to judgment by the court of appeals.

in interstate commerce by an interstate pipeline company to direct industrial customers (Pet. App. 12a–22a). Prior to the court of appeals' decision, the Commission issued its opinion reaching the contrary conclusion in the curtailment proceeding (Pet. App. 53a–66a).

The court of appeals also held that the Commission has no jurisdiction to issue a certificate of public convenience and necessity authorizing United to continue operating certain of its pipeline facilities used to deliver natural gas to one of LP&L's generating plants (Pet. App. 22a–26a), despite the pendency at that time of a proceeding initiated by United before the Commission involving the same issue.[3]

A. PROCEEDINGS BEFORE THE COMMISSION

The Curtailment Proceeding

In October 1970, United, a natural gas company subject to the Commission's jurisdiction, filed a petition with the Commission for an order declaring that its implementation of a curtailment plan was consistent with the terms of its tariff on file with the Commission and its direct sales contracts (Pet. App. 48a–49a). The petition alleged that United did not have sufficient gas reserves to meet its total contractual commitments (*ibid.*). Following notice and interventions by numerous parties, including LP&L, the matter was set for hearing before an examiner. Extensive hearings followed in which all parties and inter-

[3] *United Gas Pipe Line Company*, FPC Docket No. CP71-89, referred to herein as the "certificate proceeding."

venors were given an opportunity to present evidence and file briefs. Before the hearings were completed, however, there were several further developments.

Subsequent to the presentation by United of its direct testimony, all parties and intervenors, except the Monsanto Company, agreed to a winter curtailment program for the period from November 1, 1970, until March 31, 1971.[1] On February 22, 1971, United filed a supplement to its original petition seeking a declaratory order that a proposed summer curtailment plan from April 1971 through October 1971 was consistent with its tariff and direct sales contracts (Pet. App. 51a). Finally, on May 17, 1971, United filed proposed tariff revisions containing a curtailment plan for the 1971–1972 winter heating season and thereafter.[2] These revisions were filed in response to Commission Order No. 431 (36 Fed. Reg. 7505; reproduced as Appendix B, *infra*, pp. 50–54), which announced a general curtailment policy and directed jurisdictional pipelines anticipating gas shortages either to file tariff revisions setting forth a curtailment plan conforming to the policy or to file a statement explaining how existing curtailment plans con-

[1] Monsanto's appeal from the Commission's order approving that winter curtailment program is now pending before the United States Court of Appeals for the District of Columbia Circuit. *Monsanto Co.* v. *Federal Power Commission*, No. 71-1396 (C.A. D.C.).

[2] These revisions became effective on November 2, 1971, following a one-day suspension by the Commission (Pet. App. 52a). The validity of that order is pending on review in *Mobile Gas Service Corp., et al.* v. *Federal Power Commission*, No. 71-1607 (C.A. D.C.).

form to the policy (App. B, *infra*, p. 52). The order stated that any tariff revisions so filed, if approved by the Commission, would override inconsistent provisions in all sales contracts (*id.* at 53–54).

The hearings on United's plans and tariff revisions were completed in July 1971. Since a number of parties, including respondent LP&L, were claiming that the Commission has no jurisdiction over the curtailment of service to direct industrial customers, as distinguished from resale customers (*i.e.*, distributors and other pipelines), the intermediate decision of the examiner was waived and the matter was presented to the Commission for decision (Pet. App. 52a).

On October 5, 1971, the Commission issued Opinion No. 606 (Pet. App. 48a–76a), holding, *inter alia*, that it has plenary jurisdiction under the Natural Gas Act to accept, approve or modify the curtailment plans proposed by United or any other jurisdictional pipeline company relating to gas transported in interstate commerce to either direct or resale customers.[6] This jurisdiction, the Commission ruled, flows primarily from the Act's application, under Section 1(b), to the "transportation of natural gas in interstate commerce" and the Commission's authority under Sections 4(b) and 5(a) of the Act to prohibit undue preferences or unreasonable differences in service among classes of customers (Pet. App. 55a, 61a). In rejecting the contention that it can not allocate nat-

[6] Specific issues relating to the proper interpretation and reasonableness of United's curtailment plans were remanded to the presiding examiner for initial decision (Pet. App. 75a).

ural gas in a manner inconsistent with a pipeline's direct sales contracts, the Commission noted (Pet. App. 53a–54a):

> It follows from this argument that if the gas supply is insufficient to meet the contracted requirements of all consumers, then the direct industrial users might get their gas first, leaving only the remainder to the resale consumers—made up of households, hospitals, schools, public buildings, and industrial and commercial establishments in all states served by the jurisdictional pipelines.

Petitions for review of the Commission's decision, filed pursuant to Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)), are now pending before the United States Court of Appeals for the Fifth Circuit.[7]

The Certificate Proceeding

Also in October 1970, United filed an application with the Commission for a certificate of public convenience and necessity authorizing it to continue operating a portion of its pipeline facilities which is located wholly within Louisiana and is used to supply LP&L's Nine-Mile Point generating station (Pet. App. 53a). United alleged that these facilities were previously part of an intrastate system (Green Sys-

[7] Petitions for review have been filed by the following companies: *Louisiana Power & Light Company* (No. 71-3429), *International Paper Company* (No. 71-3531), *Gulf States Utilities Company* (No. 71-3627), *Mississippi Power & Light Company* (No. 72-1003), *Mississippi Valley Gas Company* (No. 72-1157), and *The State of Louisiana, et al.* (No. 72-1220). The first four cases were consolidated by order of the Fifth Circuit dated January 28, 1972.

tem) but had become subject to federal jurisdiction by virtue of the injection into the system of a quantity of gas in interstate commerce. Numerous parties, including LP&L, intervened and hearings were held. The decision by the examiner was waived and the matter was presented to the Commission for decision.

On February 9, 1972, the Commission issued Opinion No. 610 (United Pet. App. 91a–131a), holding that the facilities and sales in question are subject to the Commission's jurisdiction since substantial volumes of interstate gas had been introduced into the previously intrastate system and commingled with intrastate gas.[5] The Commission noted that previous judicial decisions have established that the commingling of interstate gas with intrastate gas brings the entire stream within the jurisdiction of the Commission (United Pet. App. 112a–113a; *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366; *Louisiana Public Service Commission* v. *Federal Power Commission*, 359 F. 2d 525 (C.A. 5), certiorari denied, 385 U. S. 833). The Commission also held that the relative volume of interstate gas on the facilities is not controlling (United Pet. App. 106a–108a; *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 535–536;

[5] On February 23, 1972, the Louisiana Public Service Commission filed suit in the United States District Court for the Western District of Louisiana against United and the individual Commission members, claiming that Opinion 610 constitutes an *ultra vires* action in view of the decision of the court of appeals in the instant case (see pp. 11–12, *infra*) and seeking to enjoin the Commission from exercising any jurisdiction over the Green System and from issuing any certificates relative to that system.

Federal Power Commission v. *Florida Power & Light Co.*, Sup. Ct., No. 70–38, decided January 12, 1972, slip op., p. 9, n. 10). The Commission reserved judgment on whether a certificate of public convenience and necessity should be issued in this case, remanding the matter to the hearing examiner for initial decision following the receipt of additional evidence (United Pet. App. 125a–126a).

B. THE INSTANT PROCEEDING

In March 1971, while both of the above proceedings were still pending before the Commission, LP&L[9] initiated the present case by filing an action in the district court seeking an injunction restraining United from curtailing service to its Sterlington and Nine-Mile Point generating stations and ordering United to deliver gas to LP&L in accordance with existing contracts (App. 3–11).

Following an *ex parte* hearing, LP&L obtained a temporary restraining order directing United to deliver full contract quantities of natural gas without curtailment to LP&L's generating plants (App. 111–113). After the Commission intervened, the district court dissolved the temporary restraining order and dismissed LP&L's suit on grounds that the Commission has exclusive jurisdiction over curtailments and that LP&L had failed to exhaust its administrative rem-

[9] LP&L is one of the constituent companies of a holding company known as Middle South Utilities Company, which also includes Mississippi Power and Light Co., New Orleans Public Service, Inc., and Arkansas Power and Light Co.

edies (App. 116).[10] LP&L immediately obtained an *ex parte* reinstatement of the temporary restraining order by a judge of the court of appeals (App. 117). Thereafter, in May 1971, a three-judge panel of the court of appeals refused to dissolve the temporary restraining order and remanded the case to the district court for an evidentiary hearing on the jurisdictional issue (App. 119–121; Pet. App. 43a–47a).

Following an evidentiary hearing, the district court again held that the Commission has jurisdiction over United's curtailment program, as well as jurisdiction to determine the certificate controversy. Alternately, the court held that LP&L had failed to establish irreparable injury warranting injunctive relief. Accordingly, the complaint was dismissed (App. 265–267; Pet. App. 30a–42a).

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[10] Similar suits initiated by two of United's other direct sales customers have recently been dismissed by another district court. *Texas Gulf Sulphur Co.*, v. *United Gas Pipe Line Co.* (D.D.C.), Civil Action No. 2253–71, dismissed January 21, 1972; *Monsanto Co.* v. *United Gas Pipe Line Co.* (D.D.C.), Civil Action No. 2037–71, dismissed January 21, 1972. Both cases have been appealed to the United States Court of Appeals for the District of Columbia Circuit (Nos. 72–1093, 72–1094) and consolidated for decision with *Monsanto Co. v. Federal Power Commission*, No. 71–1306 (C.A.D.C.). Appellants relying on the Fifth Circuit's decision in the present case, sought a stay and an injunction pending appeal. This request was denied on February 11, 1972. Suits by resale customers of other pipelines have been filed in *Atlanta Gas Light Co., et al.* v. *Southern Natural Gas Co., et al.*, (N.D. Ga.), Civil Action No. 16060, dismissed February 11, 1972, and *Roanoke Gas Company* v. *Columbia Gas Transmission Corp.*, (W.D. Va.), Civil Action No. 71–C–146–R. *Atlanta Gas Light* has now been appealed to the Fifth Circuit (No. 72–1539) and a motion has been made to consolidate it with *Atlanta Gas Light Co., et al.* v. *Federal Power Commission*, No. 72–1475 (C.A. 5).

On appeal, the court of appeals reversed, holding that the Commission is without jurisdiction to order curtailments of gas deliveries to direct industrial customers (Pet. App. 22a). The court noted that under Section 7 of the Act the Commission has jurisdiction to grant initial certificates of public convenience and necessity for direct sales and to authorize abandonment of such sales, but held that between these two extremes, direct sales are immune from federal regulation (Pet. App. 16a–22a). Although stating that it was withholding judgment on the "conclusions" reached by the Commission in its opinion in the curtailment proceeding (Pet. App. 27a), which had been issued some three months earlier and had been referred to extensively in the briefs and arguments before the court, the court set forth the rationale of the Commission's decision in favor of curtailment jurisdiction and squarely rejected it (Pet. App. 6a, 7a, 22a).

The court of appeals also held that the Commission has no jurisdiction to issue a certificate of public convenience and necessity covering the portion of United's pipeline facilities used to deliver natural gas to LR&L's Nine-Mile Point generating plant. The court decided the issue notwithstanding the fact that the certificate controversy was pending before, and had not then been decided by, the Commission. The court reasoned that the flow of gas through such facilities is essentially in intrastate, rather than interstate, commerce and thus is exempt from federal regulation (Pet. App. 22a–26a). The claim that the Commission should be given the opportunity to deter-

mine in the first instance whether it has jurisdiction over the facilities was rejected (Pet. App. 26a). On February 23, 1972, LP&L, relying upon the court of appeals' decision, moved in the district court for reinstatement of the temporary restraining order previously issued.

On March 6, 1972, this Court granted the petitions filed by the Commission, United and Pennzoil for writs of certiorari to review the decision of the court of appeals, but denied the petitions of the same parties seeking review before judgment in the court of appeals of the Commission's curtailment decision (App. 273).

SUMMARY OF ARGUMENT

I

In essence, the controversy here requires a determination whether the Commission has jurisdiction to allocate natural gas transported in interstate commerce by pipelines among all consumers in a fair and equitable manner when gas shortages make full deliveries to all customers impossible.

A. The court of appeals held that the Commission has no authority over curtailments of service to direct industrial customers and that the Commission's authority over direct industrial customers is limited to issuing certificates of public convenience and necessity covering deliveries of gas and authorizing their abandonment under Section 7 of the Natural Gas Act, 15 U.S.C. 717f. The effect of this decision, if sustained, would be to impair the Commission's ability to assure adequate supplies of natural gas to consumers

without alternative sources of fuel, such as homes, hospitals, schools, public buildings and some commercial establishments. Instead of the establishment under the Commission's supervision of a rational system of priorities for the allocation of scarce interstate natural gas supplies based on the needs of all customers, priorities would turn on the interpretation of contracts by courts and state regulatory authorities.

Prescribing priorities of natural gas service is not a suitable task for the courts. Curtailment controversies are highly complex, and a decision with respect to one customer or class of customers of a pipeline necessarily affects all of the pipeline's other customers. Moreover, because of their substantial impact on interstate commerce, such controversies may be beyond the constitutional power of state courts and regulatory agencies to resolve and, in any event, present problems requiring national resolution.

The Commission alone is in a position to adopt comprehensive curtailment policies in times of shortages of natural gas in interstate commerce. An examination of Sections 1(b), 4, 5 and 16 of the Natural Gas Act and decisions of this Court confirms that the Commission has comprehensive authority over curtailments of service of interstate natural gas to direct industrial customers.

B. Under Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), the Act's provisions apply to the transportation of natural gas in interstate commerce and, separately, to its sale for resale. While the Commission thus has no continuing rate jurisdiction over

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direct industrial sales, its jurisdiction over the "transportation" of the gas involved in such sales is unrestricted. As this Court has recognized in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 523, and *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 27–28, the matter of curtailments of deliveries of natural gas to direct industrial customers is one related to transportation and thus within the jurisdiction of the Commission.

The Commission's authority over curtailments is defined by Sections 4, 5 and 16 of the Act, 15 U.S.C. 717c, 717d and 717o. Under Section 16, the Commission is given the broad power to take all appropriate actions to carry out the provisions of the Act. Section 4(b) provides the substantive standard for evaluating curtailment plans, prohibiting pipelines with respect to any transportation or sale of gas subject to the Commission's jurisdiction from granting any undue preference to a person or from unreasonably discriminating against any person. Under Section 5(a), which is incorporated by reference into Section 4(e), the Commission can set aside any provisions of tariffs or contracts it finds unduly discriminatory or preferential or otherwise unjust or unreasonable. Finally, when curtailment plans are filed under Section 4, the Commission may let them take effect pending an investigation and hearing on their lawfulness.

To meet the current shortage of interstate natural gas forcing many pipelines into curtailment, the Commission issued Order No. 431 (App. B, *infra*, pp. 50–54),

requiring pipelines to take all reasonable steps to assure adequate service to their customers and, where necessary, to file curtailment plans amending existing tariffs. By adopting this procedure, the Commission brought into play the procedures of Section 4(e) whereby curtailment plans could be allowed to take effect to meet emergency conditions, pending a full investigation. The Commission's approach, we submit, was a valid exercise of its comprehensive curtailment jurisdiction.

II

The court of appeals also erred in ruling that the Commission has no jurisdiction to issue a certificate of public convenience and necessity covering the portion of United's pipeline facilities used to deliver natural gas to LP&L's Nine-Mile Point generating plant. In so ruling, the court improperly failed to follow the long standing rule that questions relating to an agency's subject matter jurisdiction should be decided by the agency in the first instance. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

Subsequent to the court's decision, the Commission issued an opinion holding that it does have certificate jurisdiction over the facilities in question (United Pet. App. 91a–131a). While we believe the Commission's decision is correct, the instant record does not afford an adequate basis for resolving the issue; accordingly, we ask the Court to reverse the judgment of the court below so that review of the Commission's certificate decision can proceed in due course.

ARGUMENT

Introduction—the Problem

In reversing the district court's dismissal of LP&L's suit for an injunction and remanding the case for further proceedings on the issue whether LP&L would suffer irreparable injury if its contracts were not enforced in full, the court of appeals based its decision on its belief that the Commission has no continuing jurisdiction over the curtailment of natural gas deliveries by interstate pipelines to direct corporate users (Pet. App. 12a–22a). If the court was wrong and the Commission has jurisdiction over curtailment plans affecting an interstate pipeline's direct corporate users, LP&L's suit should be dismissed. Moreover, there is no occasion for this Court to consider the question (not presented in our petition, see Pet. 20–21, or in that of United and Pennzoil) whether the court of appeals should have deferred to the Commission for an initial determination of the Commission's curtailment jurisdiction. Some three months prior to the decision below, the Commission issued its opinion in the curtailment proceeding fully sustaining its curtailment authority (Pet. App. 53a–66a); the rationale of the Commission's opinion was fully considered and rejected by the court below (Pet. App. 6a, 7a, 22a). Accordingly, the issue of the Commission's ultimate authority over curtailments is squarely presented by this case.[11]

[11] Although in our petitions we sought review before judgment of the Commission's curtailment opinion, as well as review of the decision below, we did so solely to give the

In order to appreciate the practical effect of the decision of the court of appeals, some background is necessary. Interstate pipelines which do not have sufficient supplies of natural gas to meet their contractual commitments to their customers are permitted to make emergency purchases for up to 60 days at any price without Commission approval (see Commission Orders Nos. 402 and 402A, 35 Fed. Reg. 7511, 8927; see also 18 C.F.R. 157.22) and for longer periods with Commission authorization (see Commission Order No. 431, reproduced as App. B, *infra*, pp. 50–54). Fourteen interstate pipelines have made emergency purchases of natural gas. Seven, including United, are unable to meet their contractual commitments and are currently in curtailment (see Pet. App. 93a for a map showing the pipelines presently in curtailment). At the present time, there are 26 cases pending before the Commission involving proposed curtailment plans (most filed in response to Commission Order No. 431) and several cases pending in the federal courts[9] which will be controlled by the decision in these cases.

Under the decision of the court of appeals, the contractual provisions of a pipeline's direct sales contracts as interpreted by various courts or state

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Court the opportunity to hear the cases in the fullest possible context. Our petition specifically pointed out that the basic curtailment issue is presented by the decision of the court of appeals alone (Pet. 12–13, 20–21).

[9] *Mobile Gas Service Corp., et al. v. Federal Power Commission*, No. 71-1607 (C.A.D.C.); *Michigan Power Co. v. Federal Power Commission*, No. 71-1752 (C.A.D.C.); *Alabama Gas Corp. v. Federal Power Commission*, No. 72-1415 (C.A.5); and cases cited in note 10 *supra*.

agencies,[12] rather than the Commission's judgment as to what is in the public interest in light of *all* contractual arrangements and the needs of *all* customers, would govern the allocation of scarce gas supplies between direct industrial users on the one hand, and resale customers, and ultimately home and other consumers, on the other hand.

In the view of the court below, the Commission's authority over direct industrial sales is limited to issuing original certificates of public convenience and necessity for such sales and authorizing their abandonment under Section 7 of the Natural Gas Act, 15 U.S.C. 717f. While the Commission does consider the terms of direct sales contracts in determining whether to issue certificates and may condition the issuance of a certificate on modification of the terms of a contract,[14] such initial approval does not obviate the need for Commission authority to override the terms of the contract in times of emergency such as when a pipeline cannot meet its contractual commitment because of inadequate gas supplies.[15]

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[13] There is serious doubt, however, whether state authorities have the requisite power to act in this area, even assuming that the Commission is without jurisdiction. See pp. 25–26, *infra*.

[14] The Commission takes into account a large variety of factors in determining whether to issue a certificate under Section 7 and can do so only "when a balance of *all* the circumstances weighs against certification." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 17 (emphasis by the Court).

[15] Nor does the Commission's power to authorize abandonments under Section 7(b) satisfy the Commission's need for

In the first place the federal or state courts are not suited for, or charged with, the responsibility of prescribing priorities of natural gas service under the guise of interpreting and applying impairment of deliveries provisions in direct sales contracts.[16] Even where such contracts permit the subordination of industrial gas needs to domestic consumption, each court entertaining a contract dispute would be required, in effect, to conduct a system-wide curtailment proceeding to determine initially the extent of domestic requirements. Furthermore, judicial determinations as to the nature of a pipeline's shortage, the extent of domestic requirements, and the rights of industrial customers could vary from state to state and court to

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comprehensive authority over curtailments. Conditions necessitating curtailments may be temporary or fluctuate from week to week, depending upon the weather, air pollution alerts or other factors. Moreover, a pipeline's shortage of gas may be mitigated as more gas is made available in response to various developments such as an area rate decision by the Commission. If, as we argue, the Commission has continuing authority over curtailments of service to direct industrial customers, the long term viability of direct sales contracts will be enhanced. Rather than being permanently cut off by forced total or partial abandonments, such customers would continue to receive as much gas as possible—consistent with a rational set of priorities—during a shortage and would again receive their full contract volumes when the emergency has ended.

[16] Natural gas contracts may provide for either firm service or interruptible service—*i.e.*, service which may be interrupted under a variety of circumstances. The mere fact that a contract provides for "interruptible" service, however, does not mean that in time of natural gas shortages deliveries under that contract will automatically be cut off. "Interruptible" provisions vary and may call for deliveries even when a pipeline is forced into curtailment. Cf. *Granite City Steel Co.* v. *Federal Power Commission*, 320 F. 2d 711 (C.A.D.C.).

court with no uniformity of regulation.[7] Finally, curtailments in service during times of gas shortage would be based upon contract terms reflecting the relative bargaining powers of the contracting parties, rather than the changing needs of the public interest. Only exclusive primary consideration by the Commission can assure the uniformity necessarily demanded to achieve equitable implementation of curtailment plans with due regard for all the needs of the public.

In sum, if the Commission is denied power to override, where necessary, provisions in direct sales contracts during an emergency, its ability to assure adequate supplies of natural gas to consumers without alternative sources of fuel—principally human needs customers such as homes, hospitals, schools, public buildings and some commercial establishments—will be severely impaired. Instead of a Commission-approved, uniform and rational system of allocating scarce supplies of natural gas in interstate commerce, a chaotic system of allocation would be likely to prevail with direct industrial users obtaining varying court-ordered priorities, many of which might be contrary to the overall public interest and result in in-

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[7] Also, curtailment provisions in different direct sales contracts entered into by a single pipeline may be inconsistent, making it impossible for the pipeline to comply with both contracts. Indeed, in this very case, the impairment of deliveries provision in United's contract to deliver gas to LP&L's Sterlington generating station (App. 23) establishes priorities that differ from and are inconsistent with those in the comparable provision in United's contract for service to LP&L's Nine-Mile Point plant (App. 88). Clearly, the Commission is best suited to resolve such inconsistencies.

adequate supplies of natural gas for human needs customers.

It is, therefore, essential that the contracts remain fully subject to the Commission's "plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests." *Permian Basin Area, Rate Cases*, 390 U.S. 747, 784. That the Commission does have "plenary authority" over curtailments of interstate natural gas to direct industrial customers is, we submit, apparent from an examination of Sections 1(b), 4, 5 and 16 of the Natural Gas Act, 15 U.S.C. 717(b), 717c, 717d, 717o.

I

THE COMMISSION HAS BROAD AUTHORITY OVER THE CURTAILMENT OF DELIVERIES OF NATURAL GAS IN INTERSTATE COMMERCE TO ALL CLASSES OF A PIPELINE'S CUSTOMERS

A. UNDER SECTION 1(b) OF THE NATURAL GAS ACT, THE PROVISIONS OF THE ACT APPLY TO THE CURTAILMENT OF DELIVERIES TO DIRECT INDUSTRIAL USERS

Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), specifies that the Act's provisions apply

> * * * to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas * * *.

Thus, as this Court has noted, *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 516,[18]—the Commission's authority under the Act extends to three distinct areas. While the application of the Act to *sales* is limited to sales of interstate natural gas for resale, the Act applies without limitation to the transportation of all gas in interstate commerce and to natural gas companies[19] engaged in such transportation. For this reason, the absence of Commission jurisdiction over the rates at which direct industrial sales are made[19a] has no effect upon its unrestricted authority over the *transportation* of interstate gas involved in such sales.[20]

[18] See also *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 473, where the Court held that even though a company makes only direct sales of natural gas, it is nevertheless engaged in the transportation of natural gas in interstate commerce and is thus a "natural-gas company" subject to the Commission's accounting regulations and the reporting requirements of the Act.

[19] A "natural-gas company" is defined by Section 2(6) of the Act, 15 U.S.C. 717a(6), as a company "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

[19a] Except as a factor to be considered in certifying direct sales under Section 7 of the Act (see pp. 24–25, *infra*). And see *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635, 647, where this Court noted that it "is clear that contracts covering direct industrial sales" come within the portion of Section 5(a) referring to "any rule, regulation, practice, or contract *affecting*" (emphasis added) any rate, charge or classification imposed by a natural gas company.

[20] The cases relied on by the court below (Pet. App. 20a)—*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185 F. 2d 357 (C.A. 3), and *City of Hastings* v. *Federal Power Commission*, 221 F. 2d 31 (C.A.D.C.), certiorari denied, 349 U.S. 920—involved disputes over rates and thus have no bearing on the issue presented here.

It is the statutory grant of authority over "transportation" which forms the basis of the Commission's curtailment jurisdiction—as two decisions of this Court have recognized. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, *supra*, 332 U.S. at 523; *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 27–28.

In *Panhandle Eastern*, the Court affirmed a state court ruling upholding the authority of the Indiana Public Service Commission to regulate certain aspects of direct industrial sales of interstate natural gas by a pipeline. The Court reviewed in some detail the legislative history of the Natural Gas Act, and concluded that the comprehensive scheme adopted by Congress for the protection of consumers is one of "cooperative action between federal and state agencies" leaving no regulatory gap which might permit natural gas companies to "divert * * * all or the cream of their business to unregulated industrial uses." 332 U.S. at 520–521. Thus, to the extent the Commission's authority does not extend to direct industrial *sales*, Congress intended such sales to be subject to regulation by the States. 332 U.S. at 516–

The Commission does not consider rate differences to be significant in determining priorities in the curtailment of service. Rejecting a proposal by United to give lowest curtailment priority to power plant and industrial customers that pay noncompensatory rates, the Commission in its curtailment decision noted that, "there is little correlation between the need to curtail deliveries because of inadequate gas reserves and the degree of compensation received for the sale of the limited gas supplies which are available" (Pet. App. 68a).

519. Of particular significance here was the Court's rejection in *Panhandle Eastern* of the contention that dual regulation was untenable because of the conflicts which might develop among state regulatory commissions and between state and federal authorities, particularly with respect to the curtailment of service when required by weather or other conditions. The Court stated that "if such conflict should develop, the matter of interrupting service is one largely related * * * to transportation and thus within the jurisdiction of the Federal Power Commission to control, 'in accommodation of any conflicting interests among various states.'" 332 U.S. at 523.

The conclusions reached in *Panhandle Eastern* with respect to curtailments were reaffirmed in *Transcontinental Gas, supra.* In that case, the Court held that the Commission could consider the proposed end use of natural gas (which was use under an electric power utility's boilers to produce electricity) and the impact that the proposed price would have on natural gas prices generally, as factors to be weighed in determining whether to issue a certificate of public convenience and necessity under Section 7 for a direct industrial sale to be transported by an interstate pipeline. Both factors involved considerations transcending state lines which, in view of Congress' desire to avoid regulatory gaps, were particularly appropriate for resolution by the federal agency. 365 U.S. at 20–22, 27–28. After quoting its statement on curtailments in *Panhandle Eastern* as a "[p]articularly relevant" example of an

area "uniquely fitted for federal scrutiny," the Court concluded (365 U.S. at 27–28):

> * * * The point is, as we have stated, that Congress did not desire an "attractive gap" in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production and sale of this valuable natural resource. Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than non-regulation. * * *

The infeasibility of state regulation of curtailments of service of interstate pipelines is apparent from the very nature of the problem—*i.e.*, the allocation of temporarily scarce interstate gas supplies among all classes of customers of a pipeline which makes deliveries to customers in many States. Since the delivery of natural gas to any one customer or class of customers of a pipeline in curtailment necessarily results in a diversion of gas from another customer or class of customers, the impact of a state court or regulatory agency order to deliver gas to direct users in one State would necessarily affect interstate commerce and arguably lie beyond state jurisdiction. See, *e.g.*, *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498; *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U.S. 575; *Pennsylvania* v. *West Virginia*, 262 U.S. 553. Denial of

the Commission's authority to include direct industrial customers in curtailment allocations would, therefore, be likely to leave such customers effectively free of regulation in this vital circumstance, contrary to the mandate of Congress recognized by this Court in *Panhandle Eastern* and *Transcontinental Gas*. And even if state courts or agencies could constitutionally be empowered to deal with curtailments, their exercise of this authority would vitally affect service to gas consumers in other States to whom they are not governmentally responsible. The problem clearly requires an interstate solution, and Congress therefore vested the Federal Power Commission with authority to deal with it in Section 1(b) of the Act.

B. THE COMMISSION'S POWERS TO EXERCISE THE CURTAILMENT AUTHORITY GRANTED BY SECTION 1(b) ARE DEFINED BY SECTIONS 4, 5 AND 16 OF THE NATURAL GAS ACT

If, as we have argued, the Natural Gas Act applies under Section 1(b) to the curtailment of deliveries of interstate natural gas to direct industrial customers, the Commission's authority over such curtailments is broad. The general nature of that authority is manifested by Section 16 of the Act, 15 U.S.C. 717*o*, which gives the Commission the power

> * * * to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. * * *

Referring to Section 16 in *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, this Court stated:

> * * * the width of administrative authority must be measured in part by the purposes for which it was conferred * * *. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority.

Given the magnitude and importance of the Commission's task of assuring a fair allocation of limited interstate natural gas supplies, the Commission should not be denied the necessary tools for performing that task.

An analysis of Sections 4 and 5 of the Act, 15 U.S.C. 717c and 717d, reveals specific procedures available for implementing curtailment plans and the substantive standard to guide the Commission in evaluating them. Section 4(b) contains that substantive standard in providing:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

As held by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341, the basic authority of the Commission to set aside provi-

sions of tariffs or contracts which violate this standard or are otherwise unjust or unreasonable is contained in Section 5(a), which is incorporated by reference in Section 4(e). In the terms of that Section:

> Whenever the Commission, after a hearing * * *, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice or contract affecting such rate, charge or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order * * *.

While Section 5(a) applies to all tariffs and contracts of natural gas companies, the Commission's power is further implemented by Section 4(e) which, in the case of new or changed tariffs or contracts filed by natural gas companies under Sections 4(c) or 4(d), permits the Commission to let the new or changed provisions take effect pending an investigation by the Commission. As we will now show, this power under Section 4(e) is central to the Commission's ability to implement curtailment plans in emergency situations requiring prompt regulatory action.

One of the Commission's responses to the current shortage of natural gas forcing many interstate pipe-

lines into curtailment (see map at Pet. App. 23a) was to issue its Order No. 431 (App. B, *infra*, pp. 50–54). In that order, the Commission noted the continuing inability of interstate pipelines to meet their contractual commitments and squarely placed the burden on such pipelines to take "all steps necessary" to assure as reliable and adequate natural gas service as available supplies and capacities would permit during the 1971–1972 heating season and thereafter (*id.* at 51–52). One of the steps the order required each pipeline to take, was to submit to the Commission a written report stating how the pipeline would assure adequate service. Pipelines anticipating shortages forcing them into curtailment were ordered either to file tariff sheets containing curtailment plans or to submit a statement showing that the curtailment program presently on file was adequate. The Commission specifically noted that, in developing plans, the pipelines should consider curtailing "large boiler fuel sales where alternate fuels are available" (*id.* at 53). Finally, the Commission stated that tariffs filed pursuant to the order and approved by the Commission would control in all respects, notwithstanding inconsistent provisions in direct sales or other contracts (*id.* at 53–54).[21]

[21] It was pursuant to Order No. 431 that United filed its most recent tariff revisions governing curtailments. The initial plans filed by United were not in the form of proposed tariff revisions, but were petitions for declaratory orders interpreting United's existing tariff and contracts. The Commission's rules and regulations specifically authorize a petition seeking "a declaratory order to terminate a controversy or remove uncer-

The advantages of requiring pipelines to develop proposed curtailment plans and file them with the Commission are readily apparent. First, the system operations of pipelines vary greatly depending upon their supply capability, their underground storage and pipeline transmission facilities, and their market requirements. Most importantly, however, the requirement that the pipelines file proposed curtailment plans requiring tariff revisions brings into play the procedures embodied in Section 4(e) of the Act.

When a curtailment plan is filed as an amendment to a pipeline's tariff under Section 4(d), it becomes effective, unless suspended by the Commission, at the end of 30 days [22] or on a later date specified in the filing. Where, on account of emergency or other conditions, it appears desirable in the public interest that a plan be placed into effect, the Commission, under Section 4(e), may accept the plan for filing, suspend it for any period up to five months and allow the amended tariff provisions to take effect, subject to later review of the merits of the plan. Furthermore, in a hearing instituted under Section 4(e), the pipeline has the burden of proving that its curtailment plan conforms to the requirements of the Act and may be liable in damages to the extent that it does not.

The flexibility of the Section 4 provisions in the

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tainty." 18 C.F.R. 1.7(c). While the Commission in its curtailment opinion upheld its basic authority to consider the curtailment plans filed by United (Pet. App. 53a–66a), it has not yet ruled on the merits of the plans.

[22] Section 4(d) authorizes the Commission to waive the 30-day notice period where circumstances warrant.

context of curtailment proceedings permits the Commission, when faced with a gas shortage, to allow provisions to go into effect in order to provide a working guideline of service priorities for the pipeline, while proceedings go forward to determine whether the new provisions comply with the substantive standard of Section 4(b). Such proceedings, even if prosecuted diligently, may be lengthy and complex, requiring months or even years to complete. United's curtailment proceeding, for example, was initiated some 18 months ago.

If the Commission were denied the power to effectuate curtailment plans during the pendency of curtailment proceedings before it (*i.e.*, if the Commission could take action only after hearings initiated under Sections 5 or 7 were completed), the allocation of inadequate gas supplies among a pipeline's customers in the interim might be determined by such arbitrary factors as a customer's ability to extract his full contract volumes from the line on a self-help basis. In such circumstances, not only would the prohibition in Section 4(b) against discrimination or preferential treatment be violated; physical failure of the pipeline system would also loom as a serious prospect.

The Commission's authority to order the filing of curtailment plans under Section 4 is not inconsistent with this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra.* In that case, Mobile brought an action for damages on the ground that United had broken the fixed rate terms of its contract with Mobile by filing a rate increase with the

Commission under Section 4(d). Analyzing the interrelationship between Sections 4 and 5 of the Act, the Court held that Section 4(d) did not authorize a pipeline unilaterally to change its fixed contract rates. 350 U.S. at 339–343.

In the present curtailment context, however, the issue is not whether a pipeline can unilaterally change the terms of its contracts, but whether the Commission can order pipelines, anticipating an inability to meet full contractual commitments, to work out and file curtailment plans effecting a rational allocation of the limited supplies. In promulgating Order No. 431, the Commission merely adopted the Section 4 filing procedure as the most appropriate method of exercising its curtailment authority to meet emergency conditions and implement curtailment plans.[23] The adoption of this procedure, we submit, is fully consistent with the Commission's broad mandate under Section 16 to take appropriate action to carry out the provisions of the Act (see pp. 26–27, *supra*).

That the terms of private contracts should not interfere with the legitimate exercise of Commission authority was, in fact, squarely recognized by this Court in *Mobile*. The Court there noted that (350 U.S. at 344)

> * * * denying to natural gas companies the power unilaterally to change their contracts in

[23] Another option available to the Commission would be to establish priorities of interstate natural gas service by regulation. Indeed, such a possibility is under consideration in *Reliability of Electric and Gas Service*, FPC Docket No. R–405 (37 Fed. Reg. 780).

> no way impairs the regulatory powers of the Commission, for *the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest.* The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other. [Emphasis supplied.]

In the *Permian Basin Area Rate Cases, supra,* the Court confirmed that *Mobile* was not intended to impede the Commission's authority to protect the public interest. Specifically, the Court declared (390 U.S. at 784):

> Although the Natural Gas Act is premised upon a continuing system of private contracting, *United Gas Co.* v. *Mobile Gas Corp., supra, the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests.* * * * [Emphasis supplied.]

The Court stated that "administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances." 390 U.S. at 784.

In short, we submit that the Natural Gas Act applies under Section 1(b) to the curtailment of deliveries of interstate natural gas to direct industrial consumers and that the Commission has comprehensive authority under Sections 4, 5 and 16 of the Act over such curtailments. As a further refutation of the court of appeals' holding that the Commission's authority over curtailments to direct industrial con-

sumers is limited to Section 7 (see p. 18, *supra*), we point out that the introductory language in Section 7(c), defining the scope of the Commission's certificate authority, is similar to the corresponding language in Sections 4(b) and 5(a), defining the scope of the Act's prohibition of the granting of undue preferences and the scope of the Commission's authority to set aside unlawful tariff or contract provisions. Thus, Section 7(c), 15 U.S.C. 717f(c), provides:

> No natural-gas company * * * shall engage in the *transportation* or sale of natural gas, *subject to the jurisdiction of the Commission* [unless it has obtained a certificate therefor] * * * [Emphasis supplied].

Section 4(b), 15 U.S.C. 717c(b), similarly states:

> No natural-gas company shall, with respect to any *transportation* or sale of natural gas *subject to the jurisdiction of the Commission* [make or grant any undue preference or advantage to any person, etc.] * * * [Emphasis supplied].

Finally, the authority contained in Section 5(a), 15 U.S.C. 717d(a), is also conferred "in connection with any *transportation* or sale of natural gas, *subject to the jurisdiction of the Commission* * * *." [Emphasis supplied.] Just as Section 7(c) applies to the "transportation" of natural gas as well as its "sale", Sections 4(b) and 5(a) also apply to the "transportation" of natural gas. And, as we have pointed out, the matter of curtailments is one related to "transportation."

II

THE DECISION BELOW IMPROPERLY DEPRIVES THE COMMISSION OF ITS AUTHORITY TO DETERMINE ITS JURISDICTION IN THE CERTIFICATE CASE

In addition to ruling that the Commission has no continuing authority over curtailments of interstate natural gas to direct industrial customers, the court of appeals also held that the Commission has no jurisdiction to issue a certificate of public convenience and necessity under Section 7 of the Act, 15 U.S.C. 717f, with respect to United's provision of natural gas to LP&L's Nine-Mile Point generating station.

Subsequent to the court of appeals' decision, the Commission issued its opinion in the certificate case holding that, in view of the presence of interstate natural gas in the pipeline serving the Nine-Mile Point plant, it has jurisdiction over the facilities and sales in question (United Pet. App. 91a–131a). While we believe the Commission's decision was correct—particularly in light of this Court's decisions in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 535–536, and *Federal Power Commission* v. *Florida Power & Light Co.*, No. 70–38, decided January 12, 1972, slip op. p. 9, n. 10, to the effect that jurisdiction over certain facilities under the similar jurisdictional provision contained in Section 201 of the Federal Power Act, 16 U.S.C. 824, was not dependent upon the presence of any particular quantity of interstate energy—proper review of the decision can best be effected on the basis of the full

administrative record. Accordingly, the decision of the court of appeals on this point should be reversed so that review of the Commission's decision may proceed in due course under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

By failing to defer to the Commission for an initial determination whether the presence of interstate gas in the facilities in controversy brings the facilities within the Commission's jurisdiction, the court unjustifiably refused to follow the long standing rule that questions relating to an agency's subject matter jurisdiction should be determined by the agency in the first instance. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

In *Myers*, this Court rejected the argument that the determination of a court as to the jurisdiction of a federal agency could be substituted for the decision of the agency itself in a proceeding pending before the agency. Speaking for a unanimous Court, Mr. Justice Brandeis noted that such a contention (303 U.S. at 50–51):

> * * * is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where * * * the contention is made that the administrative body lacked power over the subject matter.

In reaffirming this principle more than 20 years later, the Court specifically pointed out that the need

to protect the primary authority of an agency to determine its own jurisdiction "is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the [agency]. While the [agency's] decision is not the last word, it must assuredly be the first." *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 185.

In the context of a Federal Power Commission proceeding, this Court in *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, cited *Myers* in reversing *per curiam* a court of appeals decision (156 F. 2d 821 (C.A.D.C.)) permitting an electric power company to maintain an action for a declaratory judgment on whether the Federal Power Commission had exclusive regulatory control over the company's accounting practices. The court of appeals had based its decision on the fact that the Commission's then pending proceeding could have resulted in an order forcing the company to disobey an earlier accounting order issued by a state regulatory authority. 156 F. 2d at 824–826. Responding to a similar contention, this Court stated in *Myers* (303 U.S. at 51):

> Obviously, the rule requiring exhaustion of administrative remedies cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. * * *

Decision by the court below of the certificate issue was especially inappropriate here because the court below did not have before it all the evidence which had been before the Commission. The record before the Commission on this issue consisted of 1,276 pages of transcript, 63 exhibits and 10 items by reference; this record was analyzed in detail in the course of the Commission's comprehensive opinion issued after the decision below (United Pet. App. 91a–131a). The matter was clearly one for the Commission initially to decide.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part:

Section 1:

(a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boun-

dary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission ~~that~~ such State ~~commission~~ has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 4:

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of services.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas

company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter

upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it was otherwise go into effect; and after full hearings either completed before or after the rate change classification or service goes into effect the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commis-

sion shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by

a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7:

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of

adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited.

Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

* * * * * *

Section 16:

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

APPENDIX B

United States of America Federal Power Commission

(18 CFR 2.70)

Before Commissioners: JOHN N. NASSIKAS, Chairman; LAWRENCE J. O'CONNOR, JR., JOHN A. CARVER, JR., and ALBERT B. BROOKE, JR.

Policy with Respect to Establishment of Measures to be Taken for the Protection of as Reliable and Adequate Service as Present Natural Gas Supplies and Capacities Will Permit; Docket No. R-418.

ORDER NO. 431

ORDER PROMULGATING STATEMENT OF GENERAL POLICY

(Issued April 15, 1971)

In 1970, the staff, having been directed, surveyed jurisdictional pipelines to determine whether adequate gas was available to the pipelines in order to fill storage fields in anticipation of the 1970-71 heating season and in anticipation of emergencies which would arise during the heating season if adequate gas supplies were not available to the consumer. It appearing to the Commission that supplies were not available, the Commission, acting pursuant to its emergency powers, promulgated Order 402 (35 F.R. 7511) and 402A (35 F.R. 8927) which authorized distribution companies to make resales of gas to other distribution companies and to jurisdictional pipelines in order to assure that the storage fields would be filled by

winter and authorized the emergency purchases of gas from otherwise nonjurisdictional companies. This action was taken on May 6, 1970 and June 3, 1970. By notice of proposed rulemaking issued October 6, 1970 and adopted December 10, 1970 the Commission amended Section 157.29 of its Regulations (Order No. 418, 35 F.R. 19173) to permit emergency purchases of gas by natural gas pipelines directly from gas producers. Notwithstanding these emergency measures, a number of natural gas pipelines indicated their inability to delivery sufficient gas to meet their firm demands. Because of the implementation of emergency purchases coupled with a winter of normal temperatures serious disruptions of service were not widespread.

The Commission finds:

(1) The statement of general policy herein adopted concerns a matter of general policy which does not require notice or hearing under 5 U.S.C. 553.

(2) Early dissemination of this statement of general policy is in the public interest. Good cause therefore exists to bring it to the immediate attention of persons affected thereby.

The Commission, acting pursuant to the authority of the Natural Gas Act, as amended, particularly sections 4, 5, 7, 8, 10, 16 thereof (52 Stat. 822, 823, 824, 825, 826, 830; 56 Stat. 83, 85, 15 U.S.C. § 717c, § 717d, § 717f, § 717g, § 717i, § 717o, *orders:*

(A) Part 2, Subchapter A, General Rules, Chapter I, Title 18 of the Code of Federal Regulations is amended by adding a new section 2.70 to read as follows:

PART 2—GENERAL POLICY AND INTERPRETATIONS

* * * * *

STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS UNDER THE NATURAL GAS ACT

* * * * *

§ 2.70 Measures for the Protection of Reliable and Adequate Natural Gas Service.

This Commission, charged with the responsibility for natural gas reliability, hereby promulgates as a statement of general policy that jurisdictional pipeline companies shall take all steps necessary for the protection of as reliable and adequate service as present supplies and capacities will permit during the 71–72 heating season and thereafter, including adequate injection into storage in anticipation of the heating season.

In order to effectuate the foregoing:

(1) During the storage injection season all natural gas pipelines subject to the jurisdiction of the Commission should make every reasonable effort to fill all storage fields supplied by such pipelines to a capacity sufficient to meet the anticipated heating season demands.

(2) All jurisdictional pipelines will within 30 days hereof, submit a written report (four copies) to the Secretary of the Commission indicating how the instant statement of policy will be implemented. Pipelines responding that curtailment will be necessary will file a tariff sheet, pursuant to Sections 4 and 5 of the Natural Gas Act and the Commission's Regulations thereunder, setting forth a curtailment plan to effectuate the instant policy or state that the curtailment program, if any, currently on file will effectuate this policy. The curtailment

plan proposed may be divided between the injection season and the heating season, since different objectives may require different treatment.

Consideration should be given to the curtailment of volumes equivalent to all interruptible sales and to the curtailment of large boiler fuel sales where alternate fuels are available.

(3) The Commission recognizing that additional short-term gas purchases may still be necessary to meet the 1971–1972 demands, will continue the emergency measures referred to earlier for the stated 60-day period. If the emergency purchases are to extend beyond the 60-day period paragraph 12 in the Notice issued by the Commission on July 17, 1970, in Docket No. R–389A should be utilized (35 F.R. 11638). The Commission will consider limited term certificates with pre-granted abandonment, if the pipeline demonstrates emergency need, after complying with paragraphs 1 and 2, above.

(4) Where emergency gas purchases are made and/or a curtailment program is instituted to implement the above policy the pipeline should place, or already have in effect, volumetric limitations on sales at current levels.

(5) Notice should be taken that the Commission will re-examine existing commodity rate levels and, to the extent necessary, may redesign existing commodity-demand rate relationships in present and future pipeline rate cases.

(6) Pipelines who can do so are encouraged to propose exchange arrangements with other pipelines.

(7) Jurisdictional pipelines have the responsibility in the first instance to adopt a curtailment program by filing appropriate tariffs. Such tariffs, if approved by the Commission, will control in all respects notwithstanding

inconsistent provisions in sales contracts, jurisdictional and non-jurisdictional, entered into prior to the date of the approval of the tariff.

Nothing stated herein should be construed as placing a limitation on measures to be taken by jurisdictional pipelines to effectuate the instant policy.

(B) The statement of general policy adopted herein shall be effective upon issuance of this order.

(C) The Acting Secretary shall cause prompt publication of this statement of general policy to be made in the Federal Register.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Acting Secretary.

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IN THE

Supreme Court of the United States

October Term 1971

Nos. 71-1016 and 71-1040

FEDERAL POWER COMMISSION, *Petitioner,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondent*

UNITED GAS PIPE LINE CO., ET AL., *Petitioners,*

v.

LOUISIANA POWER & LIGHT CO., ET AL., *Respondent.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR AMICI CURIAE
and
BRIEF FOR MOBILE GAS SERVICE CORPORATION, ET AL., AMICI CURIAE

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IN THE

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LOUISIANA POWER & LIGHT CO., ET AL., *Respondent.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

MOTION FOR LEAVE TO FILE BRIEF FOR AMICI CURIAE

Mobile Gas Service Corporation, Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District (hereinafter, collectively, "Distributors") respectfully move for leave to file the attached brief as amici curiae. The brief is partly in support and partly

in opposition to petitioners. The same, it is expected, will be true as to respondents.[1]

Distributors have obtained the petitioners' consent but have been denied that of respondent Louisiana Power & Light Company ("LP&L"), as shown by letters from counsel filed herewith.

Distributors are gas utilities dependent solely on petitioner United Gas Pipe Line Company for natural gas to meet the consuming public's requirements in the territories served. They have actively defended and are continuing to defend their interests and those of the public in the maintenance of the supply of that gas before the Federal Power Commission and before the courts on review of Commission orders affecting that supply, including the six consolidated cases now pending in the United States Court of Appeals for the Fifth Circuit for review of the Commission's curtailment jurisdiction decision. They also filed a motion and memorandum in this Court (Nos. 71-1016 and 71-1040) on the petitions for writs of certiorari.

However, Distributors were not parties to the case in which the Fifth Circuit entered the decision here under review, although they concur with other amici in urging that they and all of United's resale customers were indispensable parties to that case. If that decision is allowed to stand and is applied to United's other consumer customers like LP&L, Distributors

[1] In filing this motion and serving the brief at this time, we have sought to avoid unnecessary repetition of arguments advanced in the briefs of petitioners and amici aligned with them where we support them and to make our brief responsive to theirs where we oppose them, while at the same time affording respondents equal opportunity with respect to our contentions.

and other resale customers of United will face the prospect of curtailments much greater than those they have opposed thus far.

Distributors' brief undertakes to show that:

(1) The court of appeals erred in holding that LP&L, which is a nonjurisdictional-sale customer of United, is entitled to delivery of gas without taking into account that this would prevent delivery to Distributors and other jurisdictional-sale customers of gas required for ultimate distribution to the public. The holding conflicts with the primary purpose of the Natural Gas Act, which was to supplement state regulation of the gas industry and make that regulation effective.

(2) The court's refusal to apply the exhaustion rule was erroneous under controlling decisions that leave no room for controversy. Moreover, its decision, when issued January 14, 1972, was an unlawful collateral attack on the Commission's October 5, 1971, decision asserting plenary curtailment jurisdiction.

(3) In these circumstances we think this Court should not reach the questions of coverage that the court of appeals erroneously essayed to decide. But, against the possibility that the Court may think otherwise, we undertake to show, on the question of the Commission's claimed curtailment jurisdiction over service to nonjurisdictional-sale customers, that the court of appeals reached a loosely right result as qualified by it: "unless and until the right to abandon certificated facilities is requested" (FPC Pet. App. A, 18a), but for the wrong reason. The statutory exception of sales not for resale from the Commission's jurisdiction does not nullify its jurisdiction over transportation "in interstate commerce," as the court held.

However, such jurisdiction as it has over curtailment of transportation has not been invoked and the Commission's efforts to find such jurisdiction, with respect to jurisdictional- and nonjurisdictional-sale customers, equally, in the rate sections of the Act, will not stand analysis.

(4) On the other question of coverage of the Gas Act that the court of appeals undertook to decide, every one of its attempts to justify its conclusion that the gas transportation involved is not "in interstate commerce" flouts principles firmly established by this Court's decision and the ruling of the court of appeals should be summarily reversed.

Respectfully submitted,

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March 28, 1972

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR MOBILE GAS SERVICE CORPORATION, ET AL., AMICI CURIAE

Subject to the granting of the attached motion for leave to file a brief amici curiae, Mobile Gas Service Corporation, et al., ("Distributors") submit this brief to bring to the Court's attention their claims, as local gas utility customers of petitioner United Gas Pipe Line Company, upon that company's allegedly short

supply of natural gas.[1] The Fifth Circuit held that United must devote its available gas to supply in full the claims of nonjurisdictional-sale [2] (direct industrial) customers, without considering other claims upon that supply. In the presently prevailing circumstances such preference, if extended to all of United's nonjurisdictional-sale customers, would prevent United from supplying much of the gas required by Distributors and other jurisdictional-sale customers to discharge even United's admitted delivery obligations to them, much less what they contend they are entitled to receive.[3]

The primary objective of Congress in enacting the Natural Gas Act, as we shall show, was the protection of the consuming public served by local gas utilities that are dependent on interstate pipelines for their gas supply. With that aim Congress vested in the Federal Power Commission full rate and certificate jurisdiction, not only over sales in interstate commerce for resale, but also over all transportation of natural gas in interstate commerce, whether for such sales, for hire, or otherwise.[4] Congress thus sought to occupy the constitutional gap in the regulatory powers of the

[1] For serious questions with respect to the circumstances under which the "shortage" arose, see Monsanto Reply to Pets. p. 5, n. 11 and n. 12.

[2] We use the term "nonjurisdictional-sale customers" to refer to customers purchasing from United for their own consumption and hence at rates that are not subject to FPC regulation under §§ 4, 5(a) and 1(b) of the Natural Gas Act (FPC Br. App. A, 41-45); "jurisdictional-sale customers", to those purchasing for resale in sales that are subject to such regulation.

[3] Distributors concur in the contention of Pipeline Intervenors Brief Amicus Curiae that, all else apart, the court of appeals decision should be set aside because United's other customers were indispensable parties and were not joined.

[4] *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83, 89 (1966).

states that had been made clear by preceding decisions of this Court under the commerce clause—the so-called "Attleboro Gap." The aim was to establish a "new pattern of federal and state relationship"[5] under which the rights and interests of the gas utility customers of interstate pipelines and the public they serve would be as firm as the combined regulatory actions of both governments in our dual system can make them.

Here the court of appeals has held that the district court should bypass this administrative machinery without awaiting, and without regard for, decision by the Commission in the proceedings it was even then conducting to determine the scope of its jurisdiction to reduce the service obligations of United and to fix any reductions it found appropriate, if, and to the extent that, it should find it has the authority to do so. The result is a decision that if allowed to stand, would deprive Distributors of the gas that is essential for the discharge of their obligations as public utilities.

We shall first show that the courts should await Commission decision on the questions of Commission jurisdiction that the court of appeals has held should be decided by the courts in the first instance, and some of which it has attempted to decide. These questions include: (a) whether the Commission has jurisdiction to curtail United's service obligations to its nonjurisdictional-sale (direct industrial) customers[6] and (2).

[5] DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 35 (1945).

[6] Although the court of appeals purported to limit its decision to service to nonjurisdictional-sale customers, some of its language may have implications bearing on service to jurisdictional-sale

whether certain of United's gas transactions are "in interstate commerce." If, as we shall show, the court of appeals erred in not awaiting Commission decision, we think that neither of these questions should be reached by this Court in the present posture of this case.[7] But, if, nevertheless, this Court thinks otherwise, we undertake to show, on the question of the Commission's power to relieve United of service obligations to its nonjurisdictional-sale customers, that the source of the Commission's curtailment power is not to be found in the rate provisions of the Gas Act,[8]

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customers. Despite this Court's denial of writs of certiorari to review the broader question, both petitioners' briefs seek decision on that issue (FPC Br. 16, 21-28; U. Br. 13-17). Distributors show hereinafter that none of the limited powers vested in the Commission to relieve interstate pipelines of their service obligations to any kind of customer have been invoked. While the court of appeals therefore reached the right result so far as it went on this question, the statutory exception of sales to consumers from Commission regulation on which it rested its decision (FPC Pet. App. A. 17a-18a), does not exempt the transportation in interstate commerce of the gas required to make such sales, as we shall show (*infra*, pp. 19-25). In this, therefore, the court of appeals was right for the wrong reason. Both petitioners premise their arguments addressed to the broader question on the nature of United's gas shortage (FPC Br. 17; U. Br. 23). But this is a question that cannot be resolved apart from the evidence in the Commission curtailment proceeding. Distributors are contending from that evidence that United's shortage resulted from its own lack of due diligence or was deliberately incurred.

[7] Neither petition for certiorari presented any question as to the merits of the decision below on the "in interstate commerce" question. Distributors, despite their direct interest in not being preempted from their service rights under the Act, on this no less than any other ground, could not cross petition to do so because they were not parties below. This but emphasizes the error of not awaiting and following decision of the Commission, where Distributors are procedurally protected against any such *ex parte* deprivation of gas.

[8] Sections 4 and 3(a), FPC Br. App. A, 42-43.

upon which the Commission relies, but in the service provisions,[3] which have not been invoked. Until invoked there would seem to be a question of the ripeness for review by this Court of the Commission's broad claim of "plenary" curtailment jurisdiction.

And if the Court wishes to reach the second question, as to whether United's gas transactions in question are "in interstate commerce," the Fifth Circuit's decision should be reversed peremptorily. For its attempts to justify its decision are plainly erroneous under the controlling decisions of this Court.

SUMMARY OF ARGUMENT

I. The court of appeals' refusal to yield priority to FPC determination of the FPC's jurisdiction under the Natural Gas Act (1) to curtail United's service obligations, and (2) to regulate transportation of gas on United's so-called "Green System" (as being "in interstate commerce"), is in conflict with *J. M. Huber Corp.* v. *Denman*, 367 F. 2d 104, 111-112 (5th Cir. 1966). It is also in conflict with a great number of controlling decisions of this Court from *Texas Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); through *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-71 (1970). A number of such cases are cited and aspects of particular pertinence here are mentioned, including the per curiam decision in *FPC* v. *Arkansas P. & L. Co.*, 330 U.S. 802 (1947).

II. The Gas Act's exception of sales to consumer customers from FPC rate regulation does not, as the court below held, exempt transportation in interstate com-

[3] Sections 7(a)-(c), FPC Br. App. A, 46-48.

merce of the gas sold in such excepted sales. *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950). Moreover, such exemption would defeat the statutory purpose that FPC regulation should support and make effective state regulation of local distributors' retail sales, because it would put their service in such sales at the mercy of unregulated transportation by the interstate pipeline supplier.

III. The claimed FPC power to curtail an interstate pipeline's service obligations cannot be found by combining §§ 1(b), 16, and the rate filing sections of the Act. Section 1(b) is a mere definition. Section 16 depends on the other provisions it is used to "carry out." Section 4(b) standards and the special methods of implementing them provided in the rate sections cannot be separated (*Montana-Dakota U. Co.* v. *Northwestern P.S. Co.*, 341 U.S. 246 (1951)), and they cannot be implemented under § 16 with respect to service curtailments without their procedural safeguards.

Moreover, the rate filing sections merely provide a procedure for the exercise by the interstate pipelines of such power as they otherwise have to make changes —the filing sections themselves do not confer that power. This was made clear in *United Gas P.L. Co.* v. *Mobile Gas S. Corp.*, 350 U.S. 332 (1956). In the case of a change in service obligations, the "power" to make the change depends upon compliance with the certificate provisions of § 7 of the Act.

The FPC attempts (Br. 31, *et seq.*) to answer *Mobile* by disclaiming its previous reliance on the rate filing provisions as a source of power to make curtailments. It now explains that it adopted the rate filing proce-

dures for service curtailments by issuing order No. 431. But it says that the order was issued in the exercise of its curtailment power!

Sun Oil Co. v. *FPC*, 364 U.S. 170 (1960) and *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960), make clear that contract and tariff provisions do not limit service obligations. Service obligations arise out of the § 7(b) prohibition of abandonment of jurisdictional facilities or service rendered by means thereof.

Such court decisions as there have been, as well as United's own past interpretation of its service obligations, all show that those obligations cannot be curtailed without compliance with the certificate provisions of § 7.

IV. No application or other attempt to invoke the certificate provisions of the Act has been made. Without that, *United Gas P.L. Co.* v. *FPC*, 385 U.S. 83 (1966), makes clear that the benefits of those provisions cannot be had. The court of appeals properly did not attempt to pass on the question of the Commission's curtailment jurisdiction under provisions of the Act that have thus not been invoked.

The pleas of the Commission as to the imperative need for curtailments that can be enforced first and their lawfulness decided later (after they have done their damage—without bond or other provision for indemnification) should be addressed to Congress, as the court of appeals indicated, not to the courts. Certainly today's need does not, as the Commission now argues, mean that Congress anticipated the need in enacting the Gas Act. The Commission still has not come forward with a syllable of evidence from the leg-

islative history of the Act that Congress had any thought of such a need or any intention of dealing with it.

Nor has the Commission explained why, if it has had curtailment power under the rate sections of the Act since its one previous claim of that power in 1947 despite the 1949 Sixth Circuit decisions discrediting that claim, it asked Congress for the same power on January 17, 1971.

V. If this Court reaches the question that the court of appeals attempted to decide, whether United's transportation of gas to LP&L's Nine Mile Generating Station is in interstate commerce or not, it should peremptorily reverse. Every one of that court's five attempts to justify its conclusion is flatly wrong under the controlling decisions of this Court.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN NOT DEFERRING TO FPC DETERMINATION OF THE COVERAGE OF THE GAS ACT

The district court dismissed the complaint, holding that complainant Louisiana Power & Light Company (LP&L) (a) had not shown irreparable injury [10] and (b) that it "must exhaust its administrative remedies despite its assertion that the FPC lacks jurisdiction." [11] The court of appeals reversed on both grounds.[12]

[10] FPC Pet. App. A, 7a-12a.

[11] In support of its position on exhaustion the district court cited a number of cases and quoted a passage from 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 20.03 (1958), suggesting three "key factors to be considered" in reconciling the differences he finds in the decisions with respect to exhaustion of administrative remedies (FPC Pet. App. C, 41a).

[12] FPC Pet. App. A, 27a.

With respect to the question of irreparable injury, it held that the district court erred in finding the evidence thereof insufficient because, the court of appeals ruled, LP&L had not had the evidentiary burden on that issue under the previous remand. Accordingly, it remanded for further hearing and directed that the hearing be expedited.[13]

On the question "as to primacy of agency jurisdiction,"[14] it merely overruled the district court, holding that "FPC proceedings do [not] bar court relief." It explained that it was not making any "attempt at rationalization" of its conclusion because that "would needlessly lengthen this opinion."[15] The decision is even broader than the court seems to have been aware.

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[13] *Id.* It should be noted that determination of irreparable injury is impossible until it is determined whether the Commission has curtailment jurisdiction, and, if so, whether LP&L is being deprived of any gas to which it is lawfully entitled.

Thus, if the court of appeals is in error as to exhaustion, as we show it is, that error vitiates its reversal and remand on irreparable injury. This obviates any possible question as to the propriety of the district court's dismissing instead of merely suspending the case.

[14] FPC Pet. App. A, 26a.

[15] FPC Pet. App. A, 26a. It went on to say that it too, relied upon *Davis* §§ 20.01-20.03, and cited two of its own recent decisions *Bailey* v. *United States*, No. 71-1731, December 8, 1971, and *United States* vs *Hernandez*, No. 71-1656, December 27, 1971) (FPC Pet. App. A, 26a).

A passage in *Bailey* (slip op. 9) provides a possible clue: ". . . the federal courts halt their inquiry and defer to the administrative remedy once it is determined that a substantial question of coverage is raised." If the same panel in the present case refused to halt inquiry because it felt that its reasons for concluding that the FPC did not have jurisdiction "left no substantial question," the dispositive answer is that it was wrong in the reasons it gave for its conclusion as to each (as to curtailment jurisdiction, see *infra*, pp. 25-37; as to whether the gas transactions involved are "in interstate commerce," see *infra*, pp. 41-43).

While the court's opinion discusses the Commission's October 5, 1971, Opinion No. 606[16] (in which the FPC ruled that it had "plenary" curtailment jurisdiction under the rate sections of the Gas Act),[17] the court says that the Commission's decision is not a final determination "until affirmance upon the completion of court review. . . ."[18] It thus apparently confused FPC orders[19] with NLRB or other orders whose effectiveness is statutorily dependent on judicial action,[20] and ignored the presumption of validity attaching to orders issued by the FPC.[21] The court goes on to say that it does not pause to consider the question of collateral versus direct review rights "since both court and agency action are before us now."[22]

The court of appeals clearly erred in not yielding priority to Commission determination of the coverage of the Gas Act. Also, in not recognizing that LP&L must obtain any judicial review of the Commission's decision of such questions under the Gas Act's "distinctive formulation of the conditions under which

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[16] FPC Pet. App. A, 6a, *et seq.*

[17] FPC Pet. App. E, 54a.

[18] FPC Pet. App. A, 27a.

[19] "Sec. 21. * * * (b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs." [52 Stat. 833 (1938); 15 U.S.C. § 717t].

[20] 29 U.S.C. § 160(e). See, e.g., 15 U.S.C. §§ 46, 49, 50.

[21] See *FPC* v. *Hope Natural G. Co.*, 320 U.S. 591, 602 (1944); *Montana-Dakota U. Co.* v. *Northwestern P.S. Co.*, 341 U.S. 246, 251-252 (1951).

[22] FPC Pet. App. A, 27a, n. 18.

resort to the courts may be made . . ."[23] and may not attack it collaterally.[24] The fact that both the court and Commission decisions are before the same court of appeals for review at the same time (FPC Pet. App. 27a, n. 18) does not relieve the necessity of deciding each in its own context. It is a mere happenstance that does not alter the differing natures of the two reviews or the rights of the parties in the respective proceedings.[25]

On the threshold question of whether the courts should await the Commission's decision on the coverage of the Gas Act, the decision of the court of appeals is in square conflict with the carefully reasoned and supported opinion and decision of another panel of the same court (*J. M. Huber Corp.* v. *Denman*, 367 F. 2d 104, 111-112 (5th Cir. 1966)).[26] It is also in

[23] *FPC* v. *Pacific P. & L. Co.*, 307 U.S. 156, 159 (1939).

[24] *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-71 (1970); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-339 (1958); *Seattle* v. *Beezer*, 376 U.S. 224 (1964), granting certiorari and reversing 62 Wash. 2d 569, 383 P. 2d 895, per curiam; *Montana-Dakota U. Co.* v. *Northwestern P.S. Co.*, 341 U.S. 246, 252-253 (1951). *See Far East Conference* v. *United States*, 342 U.S. 570, 577 (1952), which indicates that where there is such a referral, judicial review thereof is in the usual statutory manner and not by the referring court in the collateral proceeding.

[25] So also the fact that the Commission "participated in the making of [the] record" before the district court (LP&L Response, 9; *cf.* FPC Br. 38 and U. Br. 24, n. 19) does not satisfy the purposes served by the exhaustion rule (see *infra*, pp. 17-19). The court of appeals has itself recognized the difference between the views of the Commission's spokesman and a Commission decision upon a formal submission in an adversary proceeding. *J. M. Huber Corp.* v. *Denman*, 367 F. 2d 104, 111 (5th Cir. 1966).

[26] Distributors could not raise this point in the court of appeals, not being parties to that litigation.

conflict with the clearly controlling decisions of this Court. See, *e.g.*, *Port of Boston Marine Terminal Association* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68-69 (1970); *United States* v. *Western Pac. RR.*, 352 U.S. 59, 65 (1956); *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952); *FPC* v. *Arkansas P. & L. Co.*, 330 U.S. 802 (1947), reversing 81 U.S. App. D.C. 178, 156 F. 2d 821 (D.C. Cir.), which had reversed 64 F. Supp. 907 (D.D.C.); *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134, 143 (1946); *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940); *Texas Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *cf. FPC* v. *Panhandle Eastern P. L. Co.*, 337 U.S. 498 (1949);[27] *Montana-Dakota U. Co.* v. *Northwestern P.S. Co.*, 341 U.S. 246, 252-253 (1951).[28]

[27] In *Panhandle* the Court's review of the Commission's claimed basis of jurisdiction for the purposes of a temporary injunctive restraint against disposition of undeveloped gas reserves by an interstate pipeline while the Commission went forward with a proceeding to determine what it could and should do about the disposition resulted in a decision that the transaction was not in the Commission's ball park. That was before *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), holding producer sales subject to FPC jurisdiction. It may be questioned whether the same result would be reached today in the light of that decision. *Cf. United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 403-404 (1965).

[28] We have found no exception to the uniformity with which Title III courts in unreversed decisions have deferred to FPC on the coverage of the statutes it administers. See, *e.g.*, *J. M. Huber Corp.* v. *Denman*, 367 F. 2d 104, 111-112 (5th Cir. 1966); *FPC* v. *Union Producing Co.*, 97 U.S. App. D.C. 223, 226-227, 230 F. 2d 36, 39-40 (1956); *Panhandle Eastern P.L. Co.* v. *Michigan Consolidated G. Co.*, 177 F. 2d 942, 945-946 (6th Cir. 1949); *Michigan Consolidated G. Co.* v. *Panhandle Eastern P.L. Co.*, 173 F. 2d 784, 788-790 (6th Cir. 1949); *Minnkota P. Coop. Inc.* v. *Swidler*, 228 F.

In *Abilene*, Mr. Justice White laid down the basic reason for requiring prior decision by the administrative agency (204 U.S. at 440):

> . . . [I]f, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate [as a basis for awarding reparations] it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates for the future would be impossible. . . .

General American showed (308 U.S. at 433) that the exhaustion (or primacy) rule calls for the court to stay "its hand pending the Commission's determination" (not oust of the court's adjudicatory power, as the court of appeals seems to have assumed, FPC Pet. App. 27a), where the agency did not have jurisdiction to award damages for breach of contract, as sued for, but a subsidiary administrative problem within its jurisdiction was involved. The case is of particular interest here because the Court there invoked § 1(18) of the Interstate Commerce Act, prohibiting abandonment without a certificate from the ICC, and said that "Until abandonment is authorized, operations must continue." That the question of FPC jurisdiction to regulate curtailment comes within the primary jurisdiction rule is clear inasmuch as the only court decision on the point, (*Panhandle Eastern P.L. Co.* v. *Michigan Consolidated G. Co.*, 177 F.2d 942, 945 (6th cir. 1949)) held that a curtailment of service like that involved here requires FPC authorization as an "abandonment." *Cf. United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83 (1966).

Texas Mexican Ry. extended the rule of *Abilene*

Supp. 968 (D. N. Da. 1963); *South Central R.E. Coop., Inc.* v. *Swidler*, 228 F. Supp. 875 (S.D. Ohio 1963); *Indiana & Michigan E. Co.* v. *FPC*, 224 F. Supp. 166 (N.D. Ind. 1963).

from reparations to operations under contracts and certificates of public convenience and necessity when it required deferral to agency determination on the question of the rights of a railroad in reorganization to continue the use of trackage rights under a contract with another railroad. Citing *Abilene* the Court said (328 U.S. at 147):

> If the parties were allowed to by-pass the Commission and litigate the question in the courts, the power to fix the rental under trackage agreements would be shifted from the Commission to the courts and juries.

Arkansas makes clear that the exhaustion rule laid down in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540 (1946), applies to FPC determination of the coverage of the acts it administers. The question on which preliminary resort to the FPC was there required was whether the FPC or the Arkansas Public Service Commission has exclusive regulatory control over [the company's] official corporate accounting records" (156 F. 2d at 822). The Court reversed with a short per curiam citation of *Myers* and *Macauley*.

The formulation of the primary jurisdiction rule in *Far East Conference* should be recalled for its reference to the importance of administrative discretion and specialization in the determination of legal as well as factual issues in relation to the business a particular agency regulates (342 U.S. at 574-575):

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting

> the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience and by more flexible procedure.

Western Pacific recognizes substantive implications of the primacy rule (352 U.S. at 65):

> The doctrine of primary jurisdiction thus does "more than prescribe the mere procedural time table of the law suit. It is a doctrine allocating the law making power over certain aspects" of commercial relations. "It transfers from court to agency the power to determine" some of the incidents of such relations.

Such substantive implications emphasize the unacceptability of the court of appeals' ill-considered conclusion that the issuance of the Commission's decision on its curtailment jurisdiction was immaterial "since both court and agency action are before us now" (FPC Pet. App. A, 27a, n. 18). See *supra*, p. 14.

The recent *Port of Boston* decision brings the entire line of clear, uneroded authority down to date and upholds (a) the primacy of agency jurisdiction in circumstances like the present; (b) the necessity for exhaustion of remedies before the agency and for review thereof as provided by the statute; and (c) the bar to review of the agency decision on the merits by the referring court.

II

TO EXEMPT TRANSPORTATION FROM FPC REGULATION BECAUSE SALE IS STATUTORILY EXCEPTED WAS ERRONEOUS UNDER THIS COURT'S CONTROLLING DECISION AND WOULD DEFEAT AN IMPORTANT PART OF THE PRIMARY PURPOSE OF THE ACT

The decision of the court of appeals that the statutory exception from FPC regulation of sales that are

not for resale also exempts the transportation of gas in interstate commerce for such sales (FPC Pet. App. A, 17a-18a) is in conflict with *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, as others show (*cf.*, FPC Br. 22; U. Br. 8). But we wish to point out additionally that, if allowed to stand, it would defeat an important part of the primary purpose of the Gas Act, which was to supplement state regulation of the gas industry in the area in which the states were constitutionally powerless to achieve effective regulation of retail rates and service.

Federal regulation of the rates that interstate pipelines charge local gas utilities, and federal abstention from regulation of the retail rates charged by the local gas utilities, left the states free to regulate the retail rates.[29] The combination of federal with state regulation was intended to overcome the constitutional gap.[30] But denial of FPC jurisdiction over transportation of gas in interstate commerce for retail sale by the pipeline would leave the states' efforts to regulate service in the retail sales that are constitutionally subject to their regulatory power unsupported by effective federal regulation of the supply of gas by the interstate pipeline on which the retail service is utterly dependent. We do not undertake to discuss the dependence of

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[29] *Pennsylvania Gas Co.* v. *Public S. Commn.*, 252 U.S. 23, 30-31 (1920); and cases cited, *infra*, in the next note.

[30] Where the states seek to exercise their power to regulate an interstate pipeline's rates in sales not for resale (*Panhandle Eastern P.L. Co.* v. *P.S. Commn. of Indiana*, 332 U.S. 507 (1947); *Panhandle Eastern P.L. Co.* v. *Michigan P.S. Commn.*, 341 U.S. 329 (1951)), Congress provided for FPC assistance to make that regulation similarly as effective as the combined action of the state and federal agencies could make it. Section 5(b) of the Gas Act, FPC Br. App. A, 45-46.

effective FPC regulation of United's service to its jurisdictional-sale customers on FPC regulation of United's transportation of gas for its nonjurisdictional sales, for while we do not concur in part of the related arguments that have been advanced, we think that such dependence appears sufficiently clear from the briefs of others (FPC Br. 17-18, 20-21; FPC Pet. 14-15; U. Br. 10-13; U. Pet. 10; Brooklyn Resp. to Pets. 5-6; Pipelines' Br. Am. 6-11; Monsanto Reply to Pets. p. 4, n. 10).

Congress enacted the Natural Gas Act because "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest. . . ."[31] These Distributors and hundreds of other gas utilities, as well as millions of consumers they together serve with gas purchased directly or indirectly, and in whole or material part, from United in its jurisdictional-sales, were the objects of Congress's concern. Yet the decision below holds that a private contract by United for a nonjurisdictional-sale of gas to an industrial consumer must be performed without any consideration of the millions Congress sought to protect.

The purpose of Congress as disclosed in the legislative history was to end a situation in which the rates and service of interstate pipelines to local distributor gas utilities were unprotected from the effects of the play of just such private interests. Such gas utilities are required by state laws to serve the public in their service territories without discrimination, to meet legally established standards of service and safety, and to do so at regulated rates. They must do business

[31] Section 1(a) of the Natural Gas Act, FPC Br. App. A, 41.

upon terms and conditions not of their own choosing, but governmentally controlled.

The historical switch to natural gas by local distributors of manufactured gas gave rise to a physically integrated natural gas utility industry, from the consumers' premises back to the wells in other states. That industry was still as highly localized in its retail service as the manufactured gas industry had been, plainly calling for local, not national, regulation. But it was at the same time totally dependent upon an interstate system for its gas supply and the adequacy and quality of its service. State efforts to regulate this new industry's retail service and rates faced defeat as a result of the repeated decisions of this Court holding that transportation and sale in interstate commerce for local distribution and retail sale were beyond the powers of the states under the commerce clause—the "Attleboro Gap."[32]

This caused the states, acting through the National Association of Railroad and Utility Commissions (NARUC), to ask Congress to occupy that gap. But they insisted that the jurisdictional basis for the new federal regulation should be scrupulously limited to the transportation and sales in interstate commerce that had been held beyond the states' constitutional powers.[33] They insisted that there should be no repeti-

[32] *Public Util. Comm'n.* v. *Attleboro Steam Elec. Co.*, 273 U.S. 83 (1927); *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 308 (1924); see *East Ohio Gas Co.* v. *Tax Comm'n.*, 283 U.S. 465 (1931); *cf. Public Utilities Comm.* v. *Landon*, 249 U.S. 236 (1919).

[33] Hearings on H.R. 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935), pp. 1637-9, 1621-1624, see generally 1604-1696; Hearings on S. 1725 before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. (1935), pp. 756-757, 765-766, see generally 746-793;

tion for the gas and electric industries of what had happened to state regulation of railroads, under the *Shreveport* decision,[34] which had upheld ICC's exercise of jurisdiction to regulate intrastate transportation that affects interstate commerce, as well as transportation *in* interstate commerce, and resulted in the ICC's substantial supersedure of state regulation of railroads. What the NARUC called for amounted to "a new pattern of federal and state relationship. . . ."[35] for the electric and natural gas industries.

The NARUC request, with its condition, was met. As the cases have since made abundantly clear,[36] Congress, by using the term "in interstate commerce," which had been used in the "Attleboro Gap" cases,

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Hearings on H.R. 11662 before Subcommittee of House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. (1936), pp. 80-81, 86-88, see generally 79-98; Hearings on H.R. 4008 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (1937), pp. 20-24; see Benton, *Jurisdiction of the Federal Power Commission and of State Agencies in the Regulation of the Electric Power and Natural Gas Industries*, 14 Geo. Wash. L. Rev. 53-56 (1945). *Cf. FTC* v. *Bunte Bros.*, 312 U.S. 349, 355 (1941). On the interrelation of the legislative history of the Federal Power Act and the Natural Gas Act see *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 211 (1964).

[34] *Houston, E. & W.T.R. Co.* v. *United States*, 234 U.S. 342, 355-360 (1914).

[35] DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 35 (1945).

[36] See, *e.g.*, *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 211-215 (1964); *Phillips Petro. Co.* v. *Wisconsin*, 347 U.S. 672, 682-683 (1954); *United States* v. *Pub. Util. Comm'n.*, 345 U.S. 295, 311 (1953); *Panhandle East. P.L. Co.* v. *Michigan P.S.C.*, 341 U.S. 329, 334 (1951); *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 471-472 (1950); *FPC* v. *Panhandle East. P. L. Co.*, 337 U.S. 498, 502 (1949); *Panhandle East. P.L. Co.* v. *P.S.C. of Indiana*, 332 U.S. 507, 514-518 (1947).

made the "Attleboro Gap" the statutory measure of the Federal Power Commission's jurisdiction over "transportation in interstate commerce" and "sales in interstate commerce for resale."[37]

While the Commission may refer to matters that are not within the "Attleboro Gap" in order to apply the standards of the Gas Act in the discharge of the powers that are conferred upon it within the "Attleboro Gap,"[38] the states retain their pre-Gas Act powers.[39] *Panhandle E.P.L. Co.* v. *Pub. Service Comm'n of Indiana,* 332 U.S. 507, 516-522 (1947). The Court there said (332 U.S. at p. 517):

> . . . The Act, though extending federal regulation, had no purpose or effect to cut down state power. *On the contrary, perhaps its primary purpose was to aid in making state regulation effective,* by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. . . . The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. [Emphasis supplied.]

The importance of this to the present case is that the Gas Act's "new pattern of federal and state relationship" (*supra,* p 23., n. 35), was intended to make

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[37] See particularly *FPC* v. *East Ohio Gas,* 338 U.S. 464, 470 n. 10, and pp. 472-3.

[38] See, *e.g., Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 597-604 (1945); *Panhandle Eastern Pipe Line Co.* v. *FPC,* 324 U.S. 635, 646-647 (1945); *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 365 U.S. 1, 24-27 (1961).

[39] The subsequent enactment of the "Hinshaw amendment" emphasizes the importance Congress attaches to the exercise of regulatory powers by the states. Subsection 1(c), 15 U.S.C. § 717(c), was added March 27, 1954, P.L. 323, 83rd Cong., 2nd Sess., 68 Stat. 36.

the service rights of United's customer gas utilities as firm and dependable as our dual system of government can make them. United is, in effect, legally bound to supply its customer gas utilities as though United were part of them and obligated equally with each to enable it to meet its utility obligations to serve the public in its service territory.

The decision of the court of appeals in extending the exception made by Congress to preserve state retail rate regulation from federal supersedure under the supremacy clause so as also to exempt transportation, would defeat state regulation of retail service rather than preserve it.

III

THE CLAIMED CURTAILMENT POWER CAN NOT BE SHOWN BY COMBINING §§ 1(b), 16, 4(b), 4(d), 4(e) AND 5(a) OF THE ACT

Petitioners' efforts[40] to create an appearance of authority for the claimed power of the Commission to relieve United of some of its service obligations (and deprive its customers of their rights to that service) by combining §§ 1(b), 16, 4(b), 4(d), 4(e) and 5(a) of the Act will not stand analysis.

Petitioners argue that the gas shortage involved here is part of a national problem that "clearly requires a . . . national solution and Congress *thereforé* vested the Federal Commission with authority to deal with it in Section 1(b) of the Act" (FPC Br. 26, emphasis supplied)[41] and that "section 1(b) of the Act

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[40] FPC Br. 21-34; U. Br. 7, 13-15.

[41] The anachronism of this argument merely hints at its total invalidity. See *infra*, pp. 39-40.

gives the FPC plenary authority over the transportation of natural gas in interstate commerce" (U. Br. 7).

But § 1(b) [42] is no more than a definition. Of itself it confers no authority. It merely describes the transactions, persons and facilities to which "[t]he provisions of this Act shall apply . . . [or] shall not apply." The claimed grant of power must therefore be found in the other sections of the Act cited by petitioners, read in the light of the § 1(b) definition, of course.

Section 16,[43] which is cited next,[44] also depends on other provisions of the Act. It is the familiar clause, found in many administrative agency statutes, authorizing the agency "to perform any and all acts, and to prescribe . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of [the Act]." With full recognition of the liberal interpretation this Court has given such provisions" as reflecting a broad authority, and in appropriate cases a correlative duty, to effectuate the public interest,"[45] the question must still be answered, what is the public interest as provided for in the other cited provisions of the Act that § 16 authorizes to be carried out?[46] We therefore turn to the next section cited (FPC Br. 27).

Section 4(b), on which petitioners place principal

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[42] FPC Br. App. A, 41.

[43] FPC Br. App. A, 49.

[44] FPC Br. 26-27; *cf.* U. Br. 13, 15.

[45] *Niagara Mohawk P. Corp.* v. *FPC*, 126 U.S. App. D.C. 376, 379 F.2d 153, 158 (1967).

[46] Petitioners' repeated reliance (FPC Br. 21, 27; U. Br. 18) on this Court's language in *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968), that the Commission's broad responsibilities there involved "demand a generous construction of its statutory authority" advances us none in our search for a provision vesting it with the novel responsibility here claimed of serving as a gas bankruptcy court.

reliance, may be loosely described as prohibiting the making or granting of any undue preference or advantage, subjecting any person to undue prejudice or disadvantage, or maintaining any unreasonable difference in rates, charges, service, facilities, or otherwise, with respect to "the sale in interstate commerce of natural gas for resale for ultimate public consumption. . . ."[47] This section and § 4(a), which provides that "all rates and charges . . . for . . . transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable,"[48] provide the standards governing the exercise of the power given the Commission in § 5(a) to fix rates, as the wording of § 5(a) itself shows. See *FPC* v. *Hope Natural G. Co.*, 320 U.S. 591, 617 (1944).

Thus § 4(b) does not stand alone, but is an integral part of the Act's mechanism for the regulation of rates and is implemented in specific and limited ways, *i.e.*, by the provisions of §§ 4(d) and 4(e) for making changes effective before completion of hearing, subject to accounting and refund of increases not ultimately justified under § 4(e), and by provisions of §§ 4(e) and 5(a) for final orders after a hearing at which the burden is on the pipeline—orders that may reduce but not increase the claimed rate.

The statutory provision for these special methods of implementing §§ 4(a) and (b) has the effect of focusing any attempt to apply § 16 to carrying them out *as so specially implemented*. In other words, the statutory means (§§ 4(d), 4(e), 5(a)) enter into and modify

[47] FPC Br. App. A, 42.

[48] FPC Br. App. A, 42.

(or clarify) the statutory end (§§ 4(a) and (b)). As this Court said in *Montana-Dakota U. Co.* v. *Northwestern P.S. Co.*, 341 U.S. 246, 251 (1951): "Petitioner cannot separate what Congress has joined together."

The reference to reparations in that opinion suggests a good illustration. Presumably the Commission might, in the absence of provision for these special methods, find reparations "necessary or appropriate," in some circumstances, to "carry out" the provisions of §§ 4(a) or (b). But, as the Act stands, neither the Commission nor the courts (nor the Commission upon reference from a court) can effectuate reparations (*id.* 254).

This brings us back to the ultimate question: does § 4(b) as implemented by those methods empower the Commission "to accept, approve, or modify plans for the curtailing of natural gas deliveries by interstate pipelines" (FPC Br. 2).[49] The Commission argues (FPC Br. 30-31) in effect that upon finding that the curtailment plan United submitted for filing "may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful" (R. 8971), it could accept that plan for filing under § 4(d) just as it could a new tariff or rate schedule for an increase in rates; suspend it for up to five months (one day here, FPC Br. 5, n. 5); and allow it to take effect the next day—without hearing and without bond or other provision for compensating customers or others who may be injured by the curtailment, if it is ultimately held to have been unlawful.[50]

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[49] The Commission asserts in its order in the curtailment proceeding (FPC Pet. App. E. 52a-53a) that it "has the authority to accept and approve tariff filings for curtailment plans . . . when that curtailment plan [sic] is necessitated by the public interest."

[50] Examination of §§ 4(d) and 4(e) (FPC Br. App. A, 43-45) will show with what care Congress provided for refunding of all excesses ultimately found in rates collected before final decision on

This argument seems to be based upon the fact that § 4(b), which it quotes (FPC Br. 27), prohibits "preference or advantage" and "prejudice or disadvantage" without restriction to rates, and prohibits any unreasonable difference in "service," as well as in "rates . . . charges, facilities, or in any other respect." [51]

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their lawfulness. See *Hope Natural Gas Co.* v. *FPC*, 196 F.2d 803 (4th Cir. 1952), for a discussion of the refund power. It is inconceivable that, if Congress had intended by those sections to authorize curtailment of service, it would not have made some corresponding provision for the protection of gas utilities suffering such curtailments and the consuming public they serve against damages caused by curtailments ultimately found unlawful. And certainly the grant of such a power would be hedged about with requirements for the finding of emergency need of the highest order to justify such an extraordinary departure from the maintenance of the *status quo*, to avoid the clear risk of unconstitutionality.

Absent such protective provisions, any curtailment plans for a 5 to 7 month season will have become *fait accompli* before any 18-month proceeding to determine its lawfulness can conclude (see FPC Br. 31) and the damage will always have been done. For the Commission to say that letting such a plan take effect by its purported acceptance for filing under § 4(d) is "subject to later review on the merits of the plan" (FPC Br. 30) raises more questions than it answers.

[51] In *Mobile Gas Service Corporation* v. *FPC*, D.C. Cir. No. 71-1607, currently pending for review of the Commission's May 28, 1971, order accepting United's May 17, 1971, submittal of its curtailment program for the 1971-1972 winter heating season now ending (FPC Br. 5, n. 5), the Commission's brief (pp. 15-16) quotes from §§ 4(d) and 4(e), emphasizing their inclusion of "service" along with "rates and charges." But this overlooks the fact that the rate sections of the Act necessarily contain references to the service involved. A rate can only be a rate for a particular service. Section 4(d) requires jurisdictional companies to give notice, by filing new rate schedules, of any change in any jurisdictional "rate, charge, or classification or service" and § 4(e) provides for hearing, suspension, and the putting into effect (subject to refund) thereof. The appropriateness of these provisions to the discharge of purely rate-regulatory functions is clear: a change in service that would provide a less costly and useful service (as, for example, a reduction in the BTU content of the gas) well might call for the same rate-regulatory treatment as an increase in the

But it is plain that this wording does not mean that the powers conferred upon the Commission by §§ 4(d), 4(e) and 5(a) include any power to "accept, approve or modify" any reduction in a service obligation. This was made clear, so far as § 4(d) is concerned, when this Court said:[52]

> "On its face, however, § 4(d) is simply a prohibition, not a grant of power.

Similarly, with respect to §§ 4(d), 4(e) and 5(a), when the Court said (350 U.S. at pp. 342-343):

> The relationship of these sections thus affords no support to petitioners' characterization of § 4(d) and (e) as establishing a rate-changing "procedure" . . . *If the purported change is one the natural gas company has the power to make,* the "change" is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. The only difference is the interim suspension power given by § 4(e), but that in no way

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charge per unit of service. A change in the volume of gas required to be delivered might not; it might instead call for the kind of regulatory treatment provided for in the compulsory service, abandonment of service, or new certificate subsections of § 7. Or the same change in service might call for both kinds of regulatory treatment. The controlling consideration is that applicability of the requirements of the rate sections does not supersede or nullify those of the service sections.

On the Commission's own assumptions, the omission of "service" from § 5(a) would be conclusive that Congress did not intend the rate sections to confer curtailment jurisdiction.

[52] *United Gas P.L. Co.* v. *Mobile Gas S. Corp.*, 350 U.S. 332, 339 (1956).

affects the character of the proceeding . . . . [Emphasis supplied.]

United "power" in that case depended on the contractual consent of its customer. Here it depends on United's obtaining a reduction of its service obligations under § 7. We consider their nature next.

An interstate pipeline's service obligations result basically from the § 7(b) [53] prohibition of abandonment of any jurisdictional facilities or service rendered by means of such facilities. While service contracts (which are both prescribed by the filed tariffs and incorporate the applicable tariff terms) may and often do throw light on what a pipeline's service obligations are, it is well established that they do not limit its service obligations. *Sun Oil Co.* v. *FPC*, 364 U.S. 170, 175 (1960); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 143 (1960); *J. M. Huber Corp.* v. *FPC*, 236 F. 2d 550 (3rd Cir. 1956). Even though a contract for a limited term service was on file *as the rate schedule*,[54] this Court held in *Sun Oil* that the statutory obligation to serve was not so limited. The Court was at pains to make this crystal clear in the companion *Sunray* case, upholding the Commission's power to provide for indefinite service by a gas producer to a pipeline (United) on a certificate application that sought to limit service to the term of the contract. The Court there analogized the problem before it to that of a pipeline serving a local distributor, and said, in words that assume heightened significance here:

. . . If the pipeline company were left free to

[53] FPC Br., App., A. 46.

[54] This was before the Commission required conversion of individual contracts to tariff and service agreement form.

> cease its service to the local distribution company, a local economy which had grown dependent on natural gas as a fuel would be at its mercy. And this, though the primary practical problem that led to the passage of the Act, was the great economic power of the pipeline companies as compared with that of the communities seeking natural gas service. . . .

Also (364 U.S. at 153):

> . . . [T]he service in which the producer engages is distinct from the contract which regulates his relationship with the transmission company in performing the service. . . .

Finally, the Court pointed out (364 U.S. at 155, 156):

> . . . The obligation that [the seller] will be under after the contract term will be one imposed *by the Act*. . . . Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. . . .[55] [Emphasis supplied.]

The Commission has long made clear that the filing of rate schedules does not dispense with the necessity for certificate authorization (18 C.F.R. § 154.22):

> . . . [N]o natural-gas company shall file . . . any new rate schedule or contract for the performance of any service for which a certificate of public convenience and necessity must be obtained pur-

[55] Referring to instances in which the Commission had issued certificates without time limitations to pipelines whose established gas reserves were shown to have a deliverability life of about 13 years, the Court said in a footnote (364 U.S. at 158, n. 25): "[I]f the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b). . . ."

> suant to section 7(c) of the Natural Gas Act, until such certificate has been issued. . . .

The Commission's history of administration of the certificate provisions of the Act has left much to be desired so far as definitions of the service obligations are concerned. In the not-unusual absence of precise documentary definition, guidance for the determination of what the existing statutory service rights are is provided by the decision in *Granite City Steel Co.* v. *FPC*, 115 U.S. App. D.C. 392, 394, 320 F. 2d 711, 713 (1963). There the Commission had attempted to order additional firm service to a local distributor customer of Mississippi River Fuel Corporation under the compulsory service provision of § 7(a) of the Act. That additional service would have required the utilization of peak day transmission capacity of Mississippi's pipeline system (whose successive enlargements had been authorized from time to time by Commission certificates) that had previously been used by Mississippi to reduce the frequency and duration of its interruptions of its non-certificated interruptible direct industrial sales. There had been no transportation certificate definition of the pipeline capacity authorized to be used to transmit the gas sold in those non-jurisdictional sales. The question arose as to how to measure such capacity in order to determine whether the newly ordered firm jurisdictional sales would impair the pipeline's ability to render adequate service for its direct industrial customers, within the meaning of § 7(a) of the Act. The Court resolved the question very tersely and simply:

> . . . We think Mississippi's service to its industrial customers will not be "adequate" within the meaning of § 7(a) unless it meets their present and

reasonably foreseeable requirements approximately *as well as the service Mississippi has been furnishing them.* [Emphasis supplied.]

Here United itself, in effect, recognized that its service obligations may exceed its contract obligations, when it took the position that its customer gas utilities are not limited to the contract maximums[56] fixed by their contracts where they have in fact been receiving service in excess of those limits. The fact is that the "all requirements" provisions of the service agreements have been observed and the qualifications thereof ignored.[57]

> Subject to the terms, conditions, and limitations hereof, Seller agrees to sell and deliver or cause to be sold and delivered to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for natural gas as follows:
>
> *For all of Buyer's requirements* for resale and distribution through its distribution system serving the communities of ..... and ....., [Emphasis supplied.]

Moreover, prior to November, 1970, United's performance of its service obligations to its gas utility customers when it experienced the onset of its present shortage and curtailed its industrial customers during

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[56] FPC Docket No. RP71-29 (the curtailment case), R. 6648, *et seq.* Article III Maximum Daily Quantity, Original Sheet No. 76, Effective August 1, 1954, of United's Service Agreement Form A, FPC Gas Tariff, First Revised Volume No. 1, reads as follows: "Unless and until increased pursuant to the later provisions of this Article, Seller shall not be required to deliver to Buyer hereunder, and Buyer shall not be entitled to receive from Seller, in any one day, more than an aggregate of ..... cubic feet of gas, which quantity is hereby designated as Seller's 'Maximum Daily Quantity.'"

[57] *Id.*, R. 845, 2309-2311, 2331-2333, 2336-2337.

the 1969-1970 winter heating season confirmed the gas utilities uncurtailability.[58]

The only judicial precedent on the question whether a curtailment of service like that involved here constitutes an abandonment of service requiring a Commission certificate under § 7(b) has held that it does, and that the district court should have dismissed a complaint for failure to exhaust the Commission's jurisdiction under that section.[59]

> . . . [A] reduction in the quantity of gas delivered or the installation of controls to permit such reduction is, if not an abandonment of a portion of the Pipe Line's facilities, certainly an abandonment of *any service* rendered by means of such facilities, and : . . the regulatory powers of the Commission extend to the proposed reduction of service by Panhandle and upon which Consolidated claimed its right to injunction.[60]

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[58] United did not curtail service to its jurisdictional-sale customers that winter (*id.*; R. 1188-1189) because it recognized that it could not lawfully do so, as appears in a letter it sent to those customers. While there stating that in view of the gas supply situation it could not commit itself to direct sale to consumers of additional volumes of gas for industrial use, it nevertheless conceded that it was obligated to supply all requirements of its customer gas utilities up to their currently effective contract maximums, including their requirements for any new industrial resale volumes that were kept within those maximums by their interruptibility (*id.*, R. 1252-1254, 2333-2334). United's executive vice president advised the president of Mobile Gas Service Corporation that Mobile "knows what our gas deliverability problem is . . . [and Mobile's president] would have to let his conscience be his guide as we do not have the right to tell Mobile Gas that they cannot take up to their full contract quantity" (*id.*, R. 1256-1257).

[59] *Panhandle Eastern P.L. Co.* v. *Michigan Consolidated G. Co.*, 177 F.2d 942, 945 (6th Cir. 1949).

[60] One of the objections Distributors are urging in the Fifth Circuit review of the curtailment proceeding is that there is no evidence to warrant the Commission's statement in its Opinion 606

If the curtailment does not amount to an abandonment requiring a § 7(b) certificate, it may be that the Commission's practice of requiring application for a new certificate under § 7(c) (FPC Br. App. A, 47-48) where there is a material change in service would suffice.[61] Or, if the shortage were one remediable by an extension, improvement, or connection and sale within the scope of § 7(a), it may be that an order under that section might be appropriate.[62] But whatever certificate proceeding is found appropriate, only by such a proceeding can the power to file a changed tariff or rate schedule for a different service be obtained.

The only answer the Commission's brief offers to the ruling of this Court in *Mobile* that the rate sections of the Act (§§ 4(d), 4(e) and 5(a)) do not empower it to "accept, approve or modify" a unilateral service curtailment that the interstate pipeline is not otherwise empowered to make, is to say that it is not relying on any grant of power by those sections but "merely" making use of the section 4 filing procedure as a "method of exercising its curtailment authority" (FPC Br. 32):

> In the present curtailment context, however, the issue is not whether a pipeline can unilaterally change the terms of its contracts, but whether the

(FPC Pet. App. E, 64a) that "here the service reduction or stoppage foreseen is one of a temporary nature and . . . there is expectation that prior service will be resumed when gas supplies are available," and on that basis they argue that United's curtailment is fully sufficient, so far as its duration is concerned, to constitute an "abandonment" within the meaning of § 7(b). See *United Gas P.L. Co.* v. *FPC*, 385 U.S. 83 (1966) where United was required to seek § 7(b) authorization.

[61] See *South Georgia Nat. G. Co.*, 23 F.P.C. 795 (1960).

[62] *Cf. Michigan Consolidated G. Co.* v. *Panhandle Eastern P.L. Co.*, 173 F.2d 784, 788-789 (6th Cir. 1949).

> Commission can order pipelines . . . to work out and file curtailment plans. . . . In promulgating Order No. 431[63] the Commission merely adopted the Section 4 filing procedure as the most appropriate method of exercising its curtailment authority. . . . [consistently] with the Commission's broad mandate under Section 16 to take appropriate action to carry out the provisions of the Act. . . .

But if not §§ 4(d), 4(e) and 5(a), which it cited, what "provisions". And why did the Commission make the § 4(e) finding: "may be . . . unlawful" (*supra*, p. 28)? The circularity of the Commission's attempt to support its curtailment jurisdiction claim by combining §§ 1(b), 16, 4(b), 4(d), 4(e), and 5(a) is apparent. Nor do the certificate provisions, to which we now turn briefly, offer the Commission an out.

IV

THE COURT OF APPEALS PROPERLY REFRAINED FROM REACHING THE QUESTION OF THE COMMISSION'S CURTAILMENT JURISDICTION UNDER THE CERTIFICATE PROVISIONS OF THE ACT

The court of appeals, in holding that the Commission lacks the claimed curtailment jurisdiction with respect to service to a nonjurisdictional-sale customer, added the qualification: "unless and until the right to abandon certificated facilities is requested" (FPC Pet. App. A, 18a). While Distributors do not believe that the questions of the coverage that the court did undertake to decide should have been reached under the exhaustion rule (*supra*, pp. 12-19), there was a further bar to reaching the part of that question the court did reserve, namely, that of the basis for the Commission's claim in the certificate sections (§§ 7(a)-7(e)) of the Act (FPC Br. App. A, 46-48). The obstacle is that

[63] FPC Br. App. B, 50-54.

there has been no attempt to invoke any such jurisdiction by the required application under § 7(b) for a certificate for abandonment of jurisdictional facilities (or of service rendered by means of such facilities), or application for any other certificate authority that might embrace or bear upon the curtailment of United's service obligations. See *supra*, pp. 35-36. Nor has the Commission informally suggested[64] or issued a show cause order under § 1.6(d) of its Rules of Practice and Procedure (18 C.F.R. § 1.6(d)) looking toward the filing of any such application.[65]

Without such an application the benefits of the certificate provisions cannot be had. *United Gas P.L. Co.* v. *FPC*, 385 U.S. 83, 91 (1966), affirming *Continental Oil Co.*, 31 F.P.C. 1079, 32 F.P.C. 8.

In its October 5, 1971, Opinion 606 in the curtailment case the Commission sought to lay a foundation in the certificate provisions of the Act for its argument for jurisdiction by combination with the rate sections.[66] As it explained in denying rehearing:[67] "The form of the filing is not the controlling consideration." Its brief before this Court does not press that argument—understandably. For what that argument amounted to was the claim that the Commission can circumvent statutory limitations of the certificate, under which its privileges become effective only prospectively,

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[64] See, *e.g.*, *South Georgia Nat. G. Co.*, 23 F.P.C. 795, 798 (1960).

[65] See, *e.g.*, *United Gas P.L. Co.* v. *FPC*, 385 U.S. 83, 85, 91 (1966); *Panhandle Eastern P.L. Co.* v. *Michigan Consolidated G. Co.*, 177 F.2d 942, 945 (6th Cir. 1949).

[66] FPC Pet. App. F, 54a-55a. The Commission's decision must, of course, be judged on its own reasons, not some other that might be deemed to support it. *Sunray Mid-Continent Oil Co.* v. *FPC*, 353 U.S. 944 (1957), *reversing per curiam*, 239 F.2d 97 (10th Cir.).

[67] FPC Pet. App. F, 79a.

only after hearing, and only upon findings satisfying the meaningful standards of public convenience and necessity (see § 7(e)). What the Commission argument seeks is, by treating a curtailment proposal as a tariff filing, to make the privilege of curtailment effective at once, without hearing, without any of those findings, and with no bond or other provision for indemnification for those who may be injured, if the final decision is that the curtailment was unlawful (*supra*, p. 28).

Whether Distributors can be deprived by such police state methods of the gas supply United is obligated to provide is not a mere matter of form. And when that deprivation threatens to continue for season after season, with no end in sight and decision as to the lawfulness of each season's curtailment never catching up with the infliction of the damage, the temerity of the claim is astonishing.

Not less astonishing is the Commission's persistence in arguing before this Court the imperative need for such power [68] after the court of appeals so cogently pointed out that the argument should be addressed to Congress, not the courts.[69] Difficult to understand, also, is the Commission's new argument that such need demonstrates that Congress intended to meet it [70] in the provisions of the Gas Act, while the Commission's brief is still unable to come up with a syllable of evidence from the committee reports, hearings, congressional debates, commission investigations, presidential messages, or any of the rest of the legislative history of the Gas Act, that shows that such need was

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[68] FPC Br. 17-21, 30-31.

[69] FPC Pet. App. A, 17a.

[70] *Supra*, p. 25, n. 41.

in fact any part of the problem aimed at by Congress. Indeed the only "emergency power" given the Commission to act without hearing was to issue temporary certificates where necessary to assure maintenance of service (pending decision on applications for a permanent certificate), not reduction of service.[71]

The only way the Commission's claim of this emergency power has ever come to the attention of a court has been collaterally where it was properly treated as not subject to attack. That was in the two successive cases before the Sixth Circuit growing out of Panhandle's postwar shortage of sufficient transmission capacity to meet its burgeoning house-heating loads (*supra,* pp. 35-36). In both of those cases, that court held that the complaints should be dismissed for failure to exhaust the administrative remedies available before the FPC. But although the Commission, under the same feeling of the need for immediate action as here, had based its jurisdictional claim on the rate sections of the Act, the court pointedly ignored that claim. In the first case it held that the Commission had jurisdiction under § 7(a) to grant the kind of relief sought from the courts,[72] and in the second, under the abandonment provisions of § 7(b).[73]

That was in 1949. There the matter rested until January 21, 1971, when the Commission in its Annual Report for 1970, asked Congress for the statutory

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[71] Section 7(c), FPC Br. App. A, 47-48.

[72] *Michigan Consolidated G. Co.* v. *Panhandle Eastern P. L. Co.,* 173 F.2d 784, 788, 789 (6th Cir. 1949).

[73] *Panhandle Eastern P. L. Co.* v. *Michigan Consolidated G. Co.,* 177 F.2d 942, 945 (6th Cir. 1949).

authority it is here telling this Court it already has.[74]

V

THE COURT OF APPEALS WAS WHOLLY IN ERROR IN HOLDING THAT UNITED'S TRANSPORTATION OF GAS TO THE NINE MILE GENERATING STATION IS NOT SUBJECT TO FPC REGULATION

If the Court thinks it should reach the question whether the transportation of gas to LP&L over United's so-called Green System in Louisiana is in interstate commerce it should summarily reverse for the manifest error of every attempted justification stated by the court of appeals for its decision.

1. The court's first and frequently reiterated reason is that only a small part (2.6%) of the gas involved comes from out of state, and that this is minimal (FPC Pet. App. A, 22a-26a). But in a case in which only about one-fifth of one percent was interstate, this Court ruled:[75]

> Congress appears to have left to the Commission's sound administrative discretion to determine

[74] "Spot shortages of natural gas which became apparent during the fiscal year and which are expected to increase in the foreseeable future suggest urgent need for congressional action to alleviate these problems and that the Commission's jurisdiction to do so should not be subject to challenge. This proposal which would add a new subsection to section 7 of the Natural Gas Act would enable the Commission to determine when an emergency exists so as to require the construction of temporary connections of facilities and extensions of facilities and the delivery, interchange, transportation, *load curtailment and allocation of gas by any gas company*, whether or not it is otherwise subject to the Commission's jurisdiction. Undisputed authority to meet such crises as they arise is necessary for effective regulation of the natural gas industry. [Emphasis supplied.]" (FPC, Annual Report, 1970 (January 21, 1971), p. 8.)

[75] *The Connecticut L. & P. Co.* v. *FPC*, 324 U.S. 515, 536 (1945).

> whether or not to assert its authority in such situations. . . . We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved and we do not think it would be appropriate to supply such a jurisdictional limitation by construction.

2. The court of appeals regarded it as "particularly significant" that the only interstate flow of gas was *into* the Green system, none *from* it (FPC Pet. App. A, 23a). This Court has rejected a similar contention.[76]

3. The court of appeals seems to adopt as its controlling criterion of FPC jurisdiction that "the channel of constant flow" must be interstate (FPC Pet. App. A, 24a-25a), citing *California v. La-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC v. Amerada Petrol. Corp.*, 379 U.S. 687, rehrg. denied, 380 U.S. 959 (1965). The term occurs in a single opinion, *La-Vaca* (379 U.S. at 369), where the constancy or lack of constancy of the flow was not in question. It was there used in referring to three other FPC jurisdictional cases in which the same was true. Constancy of interstate flow has never been held to be a requisite of FPC jurisdiction or a material factor in the decision reached. On the contrary, the inconstancy of the interstate flow that the Court nevertheless held sufficient to support FPC jurisdiction in one important case moved Mr. Justice Black, writing for a unanimous Court, to say, "The Commission's power does not vary with the rise and fall of the Susquehanna River."[77]

4. The court next relies on the fact that "The Green

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[76] *FPC v. East Ohio G. Co.*, 338 U.S. 464, 467 (1950).

[77] *Pennsylvania W. & P. Co. v. FPC*, 343 U.S. 414, 420 (1952); *cf. FPC v. Florida P. & L. Co.*, ___ U.S. ___, No. 70-38, decided January 12, 1972.

system, as an entire and separate unit, is physically located in and functions entirely in [one state]" (FPC Pet. App. A, 25a). This was held insufficient in *East Ohio* (*supra*, 42, n. 76) and *Florida P&L* (*supra*, 42 n. 77).

5. Finally the court of appeals says that "The regulation of the Green System is substantially and essentially a localized matter confined to Louisiana's jurisdiction (FPC Pet. App. A, 25a-26a). The Court of Appeals for the Ninth Circuit was reversed for just such a holding.[78]

[78] *FPC* v. *Southern Cal. Ed. Co.*, 376 U.S. 205 (1964).

CONCLUSION

The court of appeals seems to have assumed it was writing on a clean slate. Some of the resulting errors have been indicated. The judgment of the court of appeals should be reversed and that of the district court granting the motions to dismiss should be affirmed.

Respectfully submitted,

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March 28, 1972

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IN THE

Supreme Court of the United States

October Term 1971

Nos. 71-1016 and 71-1040

FEDERAL POWER COMMISSION, *Petitioner,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents.*

UNITED GAS PIPE LINE CO., ET AL., *Petitioners,*

v.

LOUISIANA POWER & LIGHT CO., ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO ORALLY ARGUE FOR STATE OF LOUISIANA AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

October Term 1971

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO ORALLY ARGUE AS AMICUS CURIAE

Pursuant to Rule 44(7) of this Court, the State of Louisiana (Louisiana) respectfully moves for leave to present oral argument in this proceeding. Consent of counsel for respondent Louisiana Power and Light Company has been denied. Louisiana believes that its participation will afford valuable assistance to the fair and full resolution of the issues raised by petitioners which would not otherwise be available.

Although arising in the context of a private lawsuit, the issues in this proceeding actually relate to conflicting and mutually exclusive claims of jurisdiction by state and federal governments. Louisiana submits that the Federal Power Commission (FPC) is attempting to regulate direct

sales for consumptive use in violation of the Natural Gas Act and invading powers reserved to the States under the Tenth Amendment to the United States Constitution. In addition, the FPC is unlawfully attempting to usurp the continuously exercised and preexisting jurisdiction of the Louisiana Public Service Commission over the separate intrastate pipeline systems owned and operated by United Gas Pipe Line Company (United) in Southern Louisiana.

The FPC was neither joined as a defendant nor obliged to intervene in this private litigation. Having voluntarily and unnecessarily elected to lend the weight of federal sovereignty to one of the opposing sides in a controversy between private parties, the FPC now enjoys the status of a party. Louisiana has vital interests at stake in the outcome of this litigation and believes that it should be afforded the same opportunity as its real antagonist, the FPC, to present its views.

Furthermore, Louisiana's position is materially different from that of all other parties to the proceeding and it alone has addressed itself to certain comprehensive and clearly relevant legal and policy considerations bearing upon the merits of the issues raised by petitioners. These include, among others, the following matters:

1. Petitioners' assert that, unless the FPC has power to override the terms of direct sales contracts dealing with impairment of deliveries during periods of gas shortage, courts and state commissions cannot establish a uniform and rational system of service priorities. Louisiana maintains that the self-enforcing curtailment plans embodied in United's direct sale contracts and in tariffs for resale customers perform this very function, and

are wholly free of any undue or unlawful prejudice or preference. It also maintains that the individual pipeline company system wide basis adopted by the FPC for curtailment purposes creates, rather than cures, undue and unlawful discrimination and preference between end-users of the same class in each state and in different states. It has proposed, as an alternative, that the FPC conduct a nationwide proceeding for the purpose of allocating interstate gas supplies between states, leaving to each state the responsibility for controlling the end-use of gas by its own citizens. This is the only feasible method of affording equal treatment to end-users whether located in the same, or in different, states.

2. Petitioners have framed the issue concerning curtailment in terms of the power of the FPC to allocate gas supplies between direct sales and resale customers of an interstate pipeline. Louisiana challenges and denies the statutory authority of the FPC to reduce contract and certificate delivery volume obligations of such pipelines to either their direct sale or resale customers. The State also relies on the legislative history of the repeated and unsuccessful efforts by the FPC to obtain from Congress express authority to deal with emergency shortages, which was expressly granted in Section 202 of the Federal Power Act but deliberately withheld in the Natural Gas Act.

3. Petitioners urge this Court to review, on the merits, the opinion and judgment of the Court of Appeals for the Fifth Circuit on

the direct sales curtailment issue but inconsistently maintain that the jurisdictional issue necessarily decided by that court with respect to the intrastate nature of United's Green System should be reviewed only on the procedural issue of exhaustion of remedies.

Louisiana exports over 73% of its total production to other states on a net delivery basis.[1] It delivers to other states 47.9% of all natural gas exported by producing states to meet the needs of other states which cannot supply their own requirements. Louisiana's economy is heavily dependent upon the availability of a firm, reliable and uninterrupted supply of natural gas.

In 1970, United supplied 47.5% of all natural gas consumed within the state. United is the predominant supplier of gas to United Gas, Inc., which owns and operates eighty-four distribution systems in Louisiana. United itself directly serves sixty-three privately-owned and municipally-owned resale customers in Louisiana. Some 380 cities and towns and 92 industrial customers in Louisiana are wholly dependent upon it for their natural gas requirements. Approximately 2,219,000 Louisiana residents are equally dependent upon United for gas used for space heating, cooking and water heating.

Louisiana believes that its interest is of a different nature than that of the other amici and, in the event, cannot be adequately and fully represented by the one of ninety-two direct industrial customers in the State.

---

[1] After subtracting interstate receipts from interstate gross deliveries.

For the foregoing reasons, Louisiana respectfully requests that if and the FPC be alloted equal time to orally argue their respective positions.

Respectfully submitted,

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FEDERAL POWER COMMISSION,
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LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Respondents

No. 71-1040

UNITED GAS PIPE LINE CO. and PENNZOIL UNITED, INC.,
Petitioners

v.

LOUISIANA POWER & LIGHT CO.,
Respondent

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF SHELL OIL COMPANY, AMICUS CURIAE

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Respondent

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF OF SHELL OIL COMPANY, AMICUS CURIAE

All parties to this case have consented in writing to the filing of this brief by Shell Oil Company, an *amicus curiae* herein. In compliance with Rule 42 of the Rules

of the Supreme Court, such written consent is being filed with the Court together with this brief.

STATEMENT OF THE CASE

Shell adopts the Statement in the Brief For The Federal Power Commission (pp. 3, 4). Shell's concern as an *amicus curiae* herein is addressed only to the second question presented in that brief and in the Brief of United and Pennzoil. That question deals with the jurisdictional status of certain pipeline facilities and particularly whether the Court below was correct in determining that status prior to an initial determination by the Federal Power Commission (FPC).

SUMMARY OF ARGUMENT

I.

Regardless of the nature of the questions that must ultimately be answered before a judgment is rendered, a suit for damages and injunctive relief by one party to a contract against another is one which is cognizable in the first instance by the Courts. The remedies sought are not available from the Federal Power Commission. This case was such a suit. The injunction sought was not against the FPC, but against United Gas Pipe Line Company (United). The Commission entered the case voluntarily as an intervenor.

Having properly assumed jurisdiction of the case and the issues therein, the question raised is whether the Court should have deferred to the FPC for its decision on the jurisdictional status of United's Green System as being either an interstate or intrastate system. This question should be considered in the light of the doctrine of pri-

mary jurisdiction, not the rule requiring exhaustion of administrative remedies.

The doctrine of primary jurisdiction, properly considered, is a guide to a court in determining whether it should refrain from exercising its jurisdiction until an agency has made an initial determination of an issue essential to the Court's judgment in the case. The need for resort to administrative judgment is the key. If the issue presents no need for agency discretion or expertise beyond a court's competence to handle in the first instance, and if the apparent lack of agency jurisdiction is reasonably clear to the court, there is no requirement to defer to initial administrative judgment. If the rule were otherwise, a serious threat to Federal court jurisdiction over cases originally cognizable therein would be presented by every claim of agency jurisdiction. No such automatic disarming of our Federal court system was intended by the Natural Gas Act.[1]

The Green System issue was decided by the Fifth Circuit on the basis of undisputed facts presented on a full record. The question was of a legal nature (intrastate or interstate commerce) customarily decided by courts. No agency discretion or expertise were required. The lack of administrative jurisdiction was reasonably apparent under the particular facts and circumstances. The Court acted within its jurisdiction in deciding the Green System to be an intrastate pipeline, without prior resort to administrative judgment.

Neither petitioner, in the Questions Presented in their petitions for certiorari or their briefs, asked for a decision

1. 52 Stat. 821-833 (1938) as amended; 15 U.S.C. §§ 717-717w.

on the merits herein of the intrastate or interstate character of the Green System. Under this Court's Rule 23, part 1(c) and Rule 40, part 1(d), this issue should not be considered on the merits herein.

II.

The eleventh hour attack on the judgment below on the basis of missing indispensable parties fails to meet the requirements of Rule 19(b) of the Federal Rules of Civil Procedure. The Rule is set out in the Appendix hereto. There has been no showing of the extent of prejudice to any particular party or group of parties. The requirements of equity and good conscience, in the application of Rule 19(b), viewed from an appellate perspective, should not favor over-turning a judgment where the challenging party waited until this time to claim his indispensability. An adequate and just judgment can be rendered in this case with the parties presently joined.

ARGUMENT

I. The Question of the Intrastate Character of the Green System Was Properly Before the Fifth Circuit.

This case was instituted as a breach of contract action seeking injunctive relief and damages. The injunctive relief sought would prevent United from reducing natural gas deliveries to LP&L in a manner inconsistent with United's contractual obligations. United's actions before the Federal Power Commission had clearly indicated their intention to effectuate such a reduction claiming FPC jurisdiction over the sales.

There were two reasons LP&L felt United's claim of FPC jurisdiction was erroneous. One was that the FPC

lacked jurisdiction to curtail direct industrial sales. The second was that the purchase at the LP&L Nine-Mile Point facility was from an intrastate pipeline system.

United's New Orleans District system, known as the "Green System", was found by the Fifth Circuit to be an intrastate system subject to the jurisdiction of the Louisiana Public Service Commission. This finding was an integral part of the Court's resolution of the contractual rights and obligations of United and LP&L.

II. Neither the Doctrine of Primary Jurisdiction Or Exhaustion of Administrative Remedies Vitiates the Holding That the Green System Is Intrastate In Character.

A. Petitioners' Reliance On *Myers*[1] Obfuscates the Real Issues of Agency And Court Jurisdiction In This Case.

United's brief (p. 19) states that a party should not be able to bypass an agency proceeding merely by claiming the agency lacks jurisdiction. This blade has two edges; however. Should a party be able to defeat the jurisdiction of a Federal Court by claiming that an administrative agency has jurisdiction of the subject matter? At the time of the Fifth Circuit's decision, the FPC had not asserted jurisdiction over the Green System.[2] The issue was presented only as a claim by United with apparent FPC staff support, a claim which they sought to establish affirmatively in the injunction proceeding. This is in sharp con-

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1. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

2. The FPC has since done so in its Opinion No. 610, issued February 9, 1972, in Docket No. CP71-89. Applications for rehearing have been filed, and action thereon is due by April 10, 1972.

trast to *Marine Engineers Beneficial Association v. Interlake Steamship Company*, 370 U.S. 173 (1962), cited by petitioners, where the NLRB had already determined, prior to the Court action, that the Association was a "labor organization" for purposes of Section 8(b) of the Labor Management Relations Act, 29 U.S.C. § 158(b).

Although there is some understandable confusion between the doctrines of primary jurisdiction and exhaustion of administrative remedies, the distinction can be best illustrated by reference to the forum where the claim is initially cognizable. *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956). Where "exhaustion" applies, if the claim was initially cognizable by the agency, judicial interference will be withheld until the administrative process is complete. "Primary jurisdiction," on the other hand, is intended as a guide to a court in determining whether it should refrain from exercising its jurisdiction over a claim properly pending before it until after an agency has made an administrative determination.[3]

If the claim of LP&L in this case could not have been brought before the FPC in the first instance, the question is properly one of primary jurisdiction, not exhaustion of administrative remedies. Stated differently, if there is no adequate administrative remedy, the exhaustion doctrine is not applicable.[4] The adequacy of the administrative remedy herein is discussed below.

Professor Davis says of the doctrine of primary jurisdiction:

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3. K. C. Davis, *Administrative Law Treatise*, Vol. 3, page 2, Section 19.01.

4. *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954).

> ". . . The principal criterion in deciding whether the doctrine is applicable usually is not legislative intent but usually is judicial appraisal of need or lack of need for resort to administrative judgment." *Administrative Law Treatise*, Vol. 3, page 53, Section 19.09.

The Fifth Circuit herein found no need to resort to prior administrative judgment. Indeed it found, from undisputed facts, that the issue of Green System jurisdiction was a legal problem resolvable, without the need for agency expertise or discretion, on the basis of "simple flow mechanics". Its determination of "the channel of constant flow" took into account the decisions in the *Lo-Vaca*[5] case, the *Amerada*[6] case, and the *Florida Parishes*[7] case.

The *Myers*[8] case was a suit to enjoin the NLRB from holding hearings to determine whether particular conduct was an unfair labor practice. This was not a case of primary jurisdiction but rather one in which the exhaustion of administrative remedies held the key issue. In light of the *Jones & Laughlin*[9] case decided the previous year, the Board's jurisdiction was quite clear. By contrast, the lack of agency jurisdiction was apparently clear to the Court in the instant case.

Although this case was not instituted to enjoin the FPC, but to protect the contractual relationship of a buyer and

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5. *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965).

6. *F.P.C. v. Amerada Petroleum Corp.*, 379 U.S. 687, rehearing denied, 380 U.S. 959 (1965).

7. *Louisiana Public Service Commission v. F.P.C.*, 359 F.2d 525 (5th Cir., 1966), cert. den. 385 U.S. 833.

8. *Myers v. Bethlehem Shipbuilding Corp.*, supra.

9. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

a seller (the FPC intervened on its own), this fact is not as important in distinguishing the *Myers* case as is the apparent clarity concerning jurisdiction over the Green System at the time of the Court's decision. In the *Florida Parishes*[10] case the Court had referred to ". . . United's purely intrastate pipeline facilities which are completely separate from its interstate system. . . ." The intrastate facilities referred to were those of the Green System. Added to this is the uncontroverted fact that no gas could flow from the Green System into United's interstate lines (see the Fifth Circuit's opinion below, slip opinion page 26). The resulting case against an ultimate holding of agency jurisdiction creates an entirely different climate for the Court's decision than was present in the *Myers* case.

In *Myers*, the Court spoke of the exclusiveness of the agency's jurisdiction and of the apparent clarity of the improvidence of the Court below. Exclusiveness is a conclusion, not a helpful criterion in seeking a solution to the problem. As to the Green System in the instant case, the critical issue is whether the FPC has *any* jurisdiction, not whether it is exclusive. The question of apparent clarity of agency jurisdiction however does help in understanding *Myers*, particularly in view of the Court's citation to its *Jones & Laughlin*[11] decision (see *Myers*, supra, 303 U.S. at 49, 52).

Unlike the *Myers* case, the Court below was faced with a question of State agency jurisdiction versus Federal agency jurisdiction. The Louisiana Public Service Com-

10. *Louisiana Public Service Commission v. F.P.C.*, supra at 527.

11. *NLRB v. Jones & Laughlin Steel Corp.*, supra.

mission has exercised jurisdiction over the Green System for many years and continues to do so. The Federal Power Commission had never claimed jurisdiction over the Green System. Under these circumstances, the clarity of agency jurisdiction weighs far more heavily toward the State agency than the Federal. If, in the instant case, the Court below had held in favor of FPC jurisdiction, one might well ask whether Louisiana could successfully assert that its state administrative remedies had not been exhausted.

In *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943), the state commission had asserted jurisdiction over the rates of the gas company. While the proceeding was pending before the state commission, the gas company sought an injunction in the Federal District Court against enforcement of the state commission's orders. In upholding the injunction, the Court held that the State Commission attempted to assert a jurisdiction which it did not possess. It was clear to the Court that administrative jurisdiction was lacking.

One can easily imagine examples which without dispute would clearly lie outside the administrative jurisdiction of the FPC, and in which no court would require prior administrative action before granting judicial relief. To the Fifth Circuit, the instant question of intrastate versus interstate commerce was determinable without the requirement of prior administrative assistance. Questions of this type have fallen within the aegis of the Federal Courts since *Gibbons v. Ogden*, 9 Wheaton 1 (1824). The Fifth Circuit is competent to decide the instant question unassisted by the FPC.

The essential legal character of the Fifth Circuit's decision on the Green System is important because of the

nature of petitioners' challenge. The question decided was one of law, free of factual dispute, and free of the need for administrative discretion. The Court below did not undertake to determine that a particular project was or was not in the public convenience and necessity or that a given rate was or was not just and reasonable. No one can doubt that such determinations were committed by Congress to the initial consideration of the FPC. Expertise and administrative discretion are the warp and woof of such matters. This is not the case with regard to the Green System issue.

It is not legal expertise that supports the application of the primary jurisdictional rule. It is expertise in dealing with the factual questions and disputes that lie beyond the scope of a court's competence to handle in the first instance. This is where petitioners err in citing *F.P.C. v. Arkansas Power & Light Co.*, 330 U.S. 802 (1947). In that case no issue was raised as to FPC jurisdiction over the operations of the power company. The issues there involved the company's accounting practices and whether, as to certain principal accounts, state or federal regulations should be followed.

From the cases cited, a standard emerges which has applicability in cases involving the doctrines of primary jurisdiction and exhaustion of administrative remedies. That standard is that, given a claim cognizable by the Court in the first instance, if the lack of administrative jurisdiction is reasonably clear to the Court, and if the determination requires no administrative discretion or expertise beyond the ability of the Court to handle in the first instance, resort to prior administrative action will not be required. That standard is met by the Fifth Circuit's decision herein.

B. The Fifth Circuit's Decision On the Green System Was Based On A Complete Record.

Both petitioners complain of the incompleteness of the record before the Court below (Solicitor's brief p. 38, and United brief p. 24). They invite a comparison to the evidence before the FPC in its Docket No. CP71-89.[12] The fact is, however, that all of United's direct evidence in the FPC proceeding relative to "the channel of constant flow" in the Green System was before the Court below.[13] Of equal importance is the fact that none of that evidence is controverted.

The testimony of Mr. J. H. Echterhoff relating, *inter alia*, to gas flows in the Green System, was subjected to direct examination by counsel for United and by the General Counsel of the FPC and to cross-examination by counsel for LP&L (Tr. 72-79; App. 177-182). Complete flow diagrams of the system showing sources of supply, points of delivery, and volumes flowing to and delivered from the Green System were admitted into evidence (Tr. 32-37, 44; United's original exhibits).

Testimony of Mr. W. B. Cassin, Mr. John Nelson, Mr. Martin T. Belvin, Jr., and Mr. C. C. Barnett, all officers of United, was also admitted and cross-examined before the Court below (Tr. 11-70, 84-173; App. 143-

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12. FPC Docket No. CP71-89, *United Gas Pipe Line Company*, in which certification of United's Green System and other facilities was sought.

13. Transcript page references herein (e.g. Tr. 72) are to the transcript of the record in Case No. 16637 in the U. S. District Court, Western District of Louisiana, Monroe Division, *Louisiana Power & Light Company v. United Gas Pipe Line Company and Pennzoil United, Inc.* It is included in its entirety in the Appendix filed herein. The Appendix page references are also given (e.g. App. 177).

177, 204-238). Each dealt in part, with the operation of the Green System. In all, there were 181 pages of testimony on direct and cross-examination, and more than 50 exhibits. This record is as complete as it need be to enable the Fifth Circuit to resolve the question of Green System jurisdiction. No missing fact has been mentioned by either petitioner.

C. United's Insistence On A Section 19(b) Review Of All Jurisdictional Challenges Assumes the Adequacy Of The Remedy As Well As The Basic Fact Of Jurisdiction.

Section 19(b) of the Natural Gas Act[14] provides for circuit court review of FPC orders. There is nothing in the Act, however, to suggest that such review is the only method of deciding a question of Commission jurisdiction. The cases cited in United's brief (pp. 22, 23) offer no such holdings.

Irreparable injury is an essential ingredient to an injunction case. To suggest that LP&L should have awaited a Commission decision in Docket No. CP71-89 overlooks the nature of the relief being sought. The Commission's certificate case (FPC Docket No. CP71-89) was commenced on October 1, 1970. The hearing was not actually convened until June 7, 1971, and the record was closed on July 2, 1971. The Commission's Opinion No. 610 in the certificate case was not issued until February 9, 1972. As of April 6, 1972, the matter was still pending before the FPC on rehearing. LP&L commenced this action on March 31, 1971 to protect its interests under its contracts with United.

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14. 52 Stat. 831 (1938); 15 U.S.C. § 717r(b).

While the delay involved seriously affects the relief sought, a more critical aspect of the problem lies in petitioners' apparent assumption that the Natural Gas Act clothes the FPC with authority to provide an adequate remedy. The fact is that the Act gives the Commission neither the authority to grant injunctive relief or the power to award damages for breach of contract. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949). If LP&L is to protect its contract rights, it must look to the courts, not the Commission.

The lack of an adequate administrative remedy and the absence of any prior assertion of FPC jurisdiction help in placing this case in proper perspective. The "exhaustion" rule is really out of context here. Petitioners' complaint is actually that the Court below should have allowed the FPC to determine in the first instance the jurisdiction of the Green System, presumably followed by appropriate judicial review under Section 19(b) of the Natural Gas Act. Such an application of the doctrine of primary jurisdiction calls for inquiry into the need for administrative expertise and discretion and the goal of uniformity and consistency of regulation.

Unlike cases involving determinations of justness and reasonableness or of the public convenience and necessity, the jurisdictional question in this case requires no agency discretion or expertise beyond the competence of the Court to handle initially. Being a legal question determined on the basis of undisputed fact, uniformity and consistency can well be served by initial Court determination. Indeed the precedential effect of a Court determination should enhance the desired characteristics of uniformity and consistency.

III. The Questions Presented By Both Petitioners On The Green System Issue Go Solely To Where The Initial Decision Should Be Made, Not Whether The Decision Was Correct On The Merits.

Rule 23, part 1(c) of the Rules of The Supreme Court requires that a petition for writ of certiorari contain:

> ". . . (c) The questions presented for review, expressed in terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

Rule 40, part 1(d)(1) and (2) provides that briefs of an appellant or petitioner on the merits shall include:

> ". . . (d)(1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.
>
> (2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."

Inasmuch as neither petitioner sought, in the petitions for certiorari or the briefs filed herein, resolution of the Green System jurisdictional issue on the merits, argument

of this issue or the merits in the Brief For Mobile Gas Service Corporation, Et Al., Amici Curiae (pp. 41-43), is improper.

IV. There Were No Indispensable Parties Missing In The Court Below.

The Brief Amicus Curiae of Pipeline Intervenors asks this Court to reverse the holding below either (1) with regard to the curtailment jurisdiction of the FPC over direct industrial purchases from interstate pipelines, or (2) because the decision was rendered without the joinder of indispensable parties. A similar position is taken by Brooklyn Union Gas Company, an *amicus curiae*. While Shell takes no position herein concerning the curtailment issue, we take exception to this eleventh hour attack on the judgment below on the basis of missing indispensable parties.

The briefs of Pipeline Intervenors and Brooklyn Union Gas Company, *amici curiae*, rely on *Sheilds v. Barrow*, 17 How. 129 (1854), in support of their claim of missing indispensable parties. This reliance apparently ignores the changes in Rule 19 of the Federal Rules of Civil Procedure made in 1966. The new rule was upheld and interpreted by this Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1966) so as to eliminate the categories and ritual inherited from *Sheilds v. Barrow*, supra, and substituting the "stated pragmatic considerations"[15] of Rule 19(b). The use of the term "indispensable" in Rule 19(b) is conclusory. The pragmatic considerations of the rule will not stretch that conclusion to cover all of United's customers in this case.

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15. 390 U.S. at 107.

Rule 19(b) of the Federal Rules of Civil Procedure[16] sets out four factors to be considered in determining whether a party is indispensable:

1. the extent the judgment might prejudice him or the other parties,
2. the extent such prejudice can be lessened by protective provisions or otherwise,
3. whether a judgment rendered without such party will be adequate, and
4. whether the plaintiffs will have an adequate remedy if the action is dismissed.

The extent of prejudice to United's customers other than LP&L (of which Shell is one) is not only indirect and immeasurable but highly speculative. No offer is made to help measure the extent of such prejudice or to list all those parties affected thereby. Presumably it includes not only those who purchase gas from United but all parties served by those purchasers. As the group expands, measurement of the prejudice becomes even more speculative. The position of parties served on United's systems, the varying capacities of such systems and their locations relative to supply all add to the speculative and immeasurable character of the prejudice alleged.

As to the adequacy of the judgment below from LP&L's view, there can be no question. As to the adequacy of their remedy if the judgment is reversed, the question was discussed earlier herein.

One more matter should be mentioned with regard to Rule 19(b). Before setting out the four factors listed

16. Rule 19(b) is set out in its entirety in the Appendix hereto.

above, the rule requires that the court consider the indispensable party question in the light of "equity and good conscience": Equity would not seem to favor allowing one to sit by until after a judgment is rendered and then be given the prerogative of deciding, if the judgment was not to his liking, that he was an indispensable party. Nowhere is it alleged that those now claiming to be indispensable parties lacked knowledge of the suit while still pending in the courts below.

V. Conclusion.

The judgment of the Fifth Circuit holding that United's Green System is an intrastate pipeline system subject to the jurisdiction of the Louisiana Public Service Commission should not be reversed. That judgment should be affirmed on the basis that the Court below acted within its jurisdiction in deciding the issue.

Respectfully submitted,

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APPENDIX

Rule 19, Federal Rules of Civil Procedure

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered

in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23. As amended Feb. 28, 1966, eff. July 1, 1966.

SUPREME COURT, U. S.
MOTION FILED
APR 11 1972

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, et al,
Respondents.

No. 71-1040

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Respondent.

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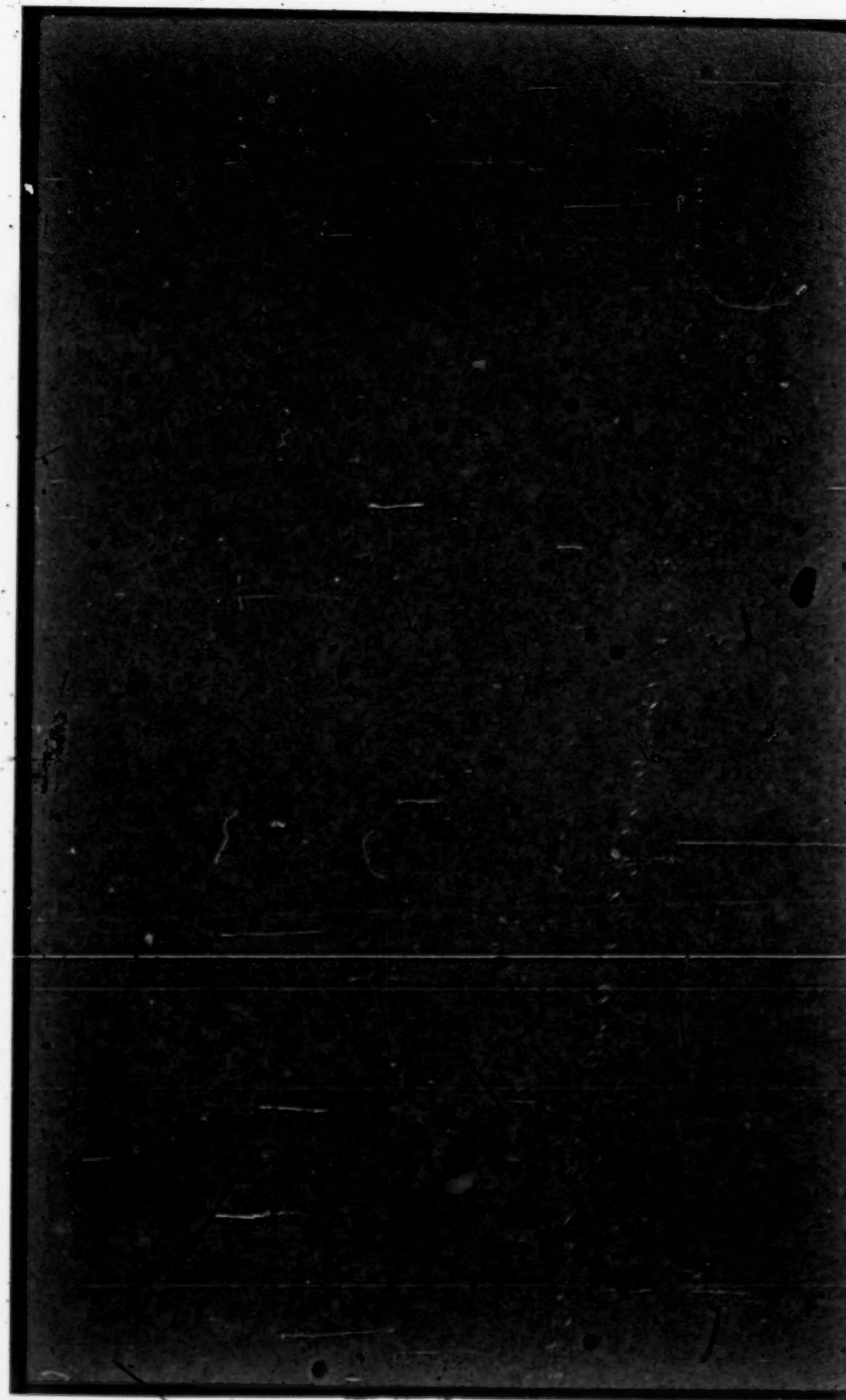

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IN THE

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Respondents.

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MOTION OF ATLANTA GAS LIGHT COMPANY, ALABAMA GAS CORPORATION, GEORGIA POWER COMPANY, SAVANNAH ELECTRIC AND POWER COMPANY, AND GEORGIA PUBLIC SERVICE COMMISSION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Atlanta Gas Light Company, Alabama Gas Corporation, Georgia Power Company, Savannah Electric and Power Company, and Georgia Public Service Commission

(Southern Consumers), respectfully move for leave to file the attached brief, as *amici curiae* in this case.

Atlanta Gas Light Company (Atlanta Gas) is a public utility organized and existing under the laws of the State of Georgia and is engaged primarily in the purchase, sale, and distribution of gas in 194 cities and communities in Georgia. It provides natural gas service to approximately 675,000 consumers. Alabama Gas Corporation (Alagasco) is a public utility engaged primarily in the purchase, sale and distribution of natural gas in 142 cities and communities in Alabama. It provides natural gas service to over 300,000 consumers. Atlanta Gas and Alagasco are the two largest customers of Southern Natural Gas Company (Southern Natural) and provide the overwhelming majority of service of natural gas from Southern Natural's pipelines to homes, schools, hospitals and other public buildings. Georgia Power Company (Georgia Power) and Savannah Electric and Power Company (Savannah Electric) are public utilities engaged in the generation, transmission and sale of electricity in the State of Georgia. Georgia Power provides service to consumers in 154 of the 159 counties in Georgia, and provides electric utility services to approximately 975,000 consumers. Savannah Electric is engaged in the generation, transmission and sale of electricity in the county of Chatham and part of four other counties in Georgia, and provides electric utility service to approximately 73,000 consumers. The two electric utilities provide the great bulk of electric power supplied to consumers within the State of Georgia for domestic, commercial and other human needs-uses. A portion of the electricity thus supplied is generated by the use of natural gas purchased from Altanta Gas, and in turn by Atlanta Gas from Southern Natural. The Georgia Public Service Commission is an agency of the State of Georgia created by the Constitution of that State and charged by the laws of the State of Georgia with the author-

ity and duty of regulating the rates and charges of gas and electric utilities in that State, with exercising general supervision over such utilities, and with protecting the interest of gas and electric consumers in the State of Georgia. These parties, the "Southern Consumers," have requested the consent of the Federal Power Commission, United Gas Pipe Line Company (United), and Louisiana Power & Light Company (LP&L) to the filing of an *amici curiae* brief, and consent has been obtained. Copies of letters evidencing such consent will be filed shortly.

The Southern Consumers receive the bulk of the natural gas which they purchase and consume from Southern Natural. Southern Natural is a large pipeline purchaser of natural gas from United the interstate pipeline whose reduction in gas sales to LP&L is involved in this case. As a result of United's curtailment plan Southern Natural also has suffered a substantial reduction in the supplies it is entitled to purchase under its contract with United.

The Federal Power Commission states in its brief (at 20-21) that the decision of the Court below will increase curtailments to United's wholesale customers (such as Southern Natural) because it will effectively eliminate the Commission's power to curtail deliveries to United's industrial customers. If this interpretation of the decision below is correct, the Southern Consumers will be adversely affected, because it will increase the reductions in gas supply from United to Southern Natural, their main source of natural gas. However, the Southern Consumers do not agree that the decision below requires this result; instead the decision below merely obliges the Commission to observe the procedures specified by the Natural Gas Act to reduce service whether that reduction is applied to industrial users or to wholesale customers. Moreover, the Southern Consumers would be even more adversely affected if this Court were to agree with the broad assertion of the Federal Power Commission that its "comprehensive curtailment jurisdiction"[1]

[1] Brief for Federal Power Commission, at 15.

ment or plenary jurisdiction" to be sustained – may be helpful to the Court.

Respectfully submitted,

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April 12, 1972

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1016

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OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

The statements of the opinions below, jurisdiction and statutes involved as set forth in the Brief of the Federal Power Commission are not disputed.

STATEMENT

We respectfully disagree with the statement contained in the Brief of the Federal Power Commission in two respects. First, the cases do not involve the jurisdiction of the Federal Power Commission in any ultimate sense to allocate the gas supply of an interstate pipeline company but involve issues concerning the limits of the particular statutory powers vested in the Commission by Congress in this regard. Second, the Court of Appeals did not hold, as asserted by the Commission (Brief at 3) that the Commission "has no curtailment jurisdiction over deliveries of natural gas transported in interstate commerce by an interstate pipeline company to direct customers." The Court of Appeals recognized this jurisdiction but held that the Commission was required to comply with the statutory scheme enacted by Congress in exercising such jurisdiction. (United Pet. Cert., at 15a - 17a)

QUESTIONS PRESENTED

Similarly, we respectfully disagree with the statement of the questions presented as set forth in the Brief of the Commission. In our view, the questions presented are as follows:

1). Whether the powers vested in the Commission with respect to reductions or "curtailments" by any interstate pipeline company and deliveries of natural gas to a direct user differ from its statutory powers respecting the curtailment of deliveries to a purchaser for resale.[1]

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[1] By repeatedly referring to the opposition which has been levelled at its attempts to assert "plenary" jurisdiction over curtailment of deliveries for *direct use*, the Commission, perhaps unintentionally, may

(Footnote continued)

2). Whether the Federal Power Commission may permit a pipeline company through a unilateral filing under Section 4 of the Natural Gas Act to implement a curtailment plan which is in breach of its contractual obligations and prior certificate orders by the Commission, or whether such a plan may be ordered by the Commission only after notice and hearing under Sections 5 or 7 of the Act.

3). Where a pipeline company unilaterally files a curtailment plan in abrogation of its contracts with its customers as well as prior certificate orders of the Commission which the Commission acting beyond its statutory powers nevertheless permits to become effective, is a customer who thereby suffers immediate and irreparable injury barred from appropriate judicial relief because of the pendancy of proceedings relative to such plan before the Commission.

SUMMARY OF ARGUMENT

Neither the term "curtailment" or "curtailment proceedings" is used in the Natural Gas Act. The Commission claims that its "plenary" and "comprehensive curtailment jurisdiction" (Brief, at 6, 15) is, put most kindly, an attempt to supply by administrative proclamation unbridled

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(Footnote continued from preceding page)

suggest that its "plenary" authority over deliveries for *resale* has a more firm or conceded basis. As will be shown below the same statutory provisions govern the Commission's authority over deliveries for both types of use.

and open-ended authority which the Commission, presumably at its election, may pursue as an alternative to the express powers vested in the Commission with *appropriate procedural safeguards* in specific sections of the Natural Gas Act. The argument for such newly-proclaimed authority is that it is necessary in order for the Commission to deal expeditiously with problems of gas allocation in times of shortage since, in the Commission's view, pursuit of its express powers under the Natural Gas Act would be unduly cumbersome. As the Court below aptly stated:

> Need may be the mother of invention; but need must have the paternal spouse – a legislative grant – to beget agency authority. (United Pet. Cert., at 17a).

The alleged need, however, is more apparent than real. Whatever delay is avoided by the exercise of this "plenary" jurisdiction is possible only by permitting the pipeline companies, acting in their respective self-interests, to regulate gas supply, and not the Federal Power Commission, as intended by Congress. Second, if an emergency arises, which requires immediate action without hearing, adequate tools are available to the Commission, as we shall show below, within the framework of Sections 5 and 7 of the Act which contain the relevant express powers. Third, whatever speed or efficiency allegedly results from transferring regulatory controls to the self-interest of the various pipeline companies is achieved only by inflicting enormous and largely irreparable losses upon the customers of the pipeline companies and the public which they serve, with the attendant disruption of stability in the natural gas industry.

Finally, the plaintiffs below, under the circumstances of these cases, were not barred from the judicial relief sought by the doctrine of exhaustion of remedies.

ARGUMENT

I. THE STATUTORY AUTHORITY OF THE FPC TO AUTHORIZE REDUCTIONS OR "CURTAILMENT" OF GAS DELIVERIES IS THE SAME REGARDLESS OF WHETHER SUCH SALES ARE FOR DIRECT CONSUMPTION OR FOR RESALE.

The Federal Power Commission has construed the decision of the Court below as affording priority in favor of direct consumers of natural gas served by pipeline companies. (Brief for Federal Power Commission at 12-13.) We do not believe that the decision below produces this result, but if it does the decision is obviously contrary to the language and purposes of the Natural Gas Act.

The FPC asserts that its authority over curtailment of deliveries rests upon its jurisdiction over the *transportation* of natural gas in interstate commerce. (Brief for Federal Power Commission, at 23.)[2] The statutory provisions relating to the Commission's jurisdiction over the *transportation* of natural gas are the same for both direct and resale customers. Accordingly, the Commission's authority to permit reductions or "curtailment" is also the same whether such sales are for resale or for direct industrial consumption.

In addition, review of the basic intent of the Act to protect resale consumers supports this position. The Natural Gas Act is obviously designed to afford a greater scope of

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[2] Broad applicability provisions of Section 1(b) of the Act obviously are not designed to furnish a definitive statement of the particular powers of the Commission with respect to the general matters stated in that section. Otherwise, later sections of the Act which limit and define with particularity the specific powers of the Commission with respect to the matters described in Section 1(b) would be meaningless.

protection to public utilities, who purchase gas from interstate pipelines for resale to customers, including homes, schools, hospitals and commercial establishments, than it does for industrial customers, who purchase gas from interstate pipelines for direct industrial consumption. The Act can scarcely be read as providing less protection against reductions in service to utilities than to the industrial customers.

II. THE COMMISSION'S AUTHORITY TO PERMIT REDUCTIONS IN SERVICE MUST BE EXERCISED IN THE MANNER SET FORTH UNDER THE NATURAL GAS ACT.

The cases before the Court arose because of a request by United pursuant to Section 5 of the Natural Gas Act that the Commission issue a declaratory order interpreting an existing tariff provision providing for curtailment of natural gas deliveries due to a shortage of gas. The Commission might have jurisdiction to do this and, *after a hearing*, would be obligated to determine whether the curtailment provision was discriminatory and to prescribe any changes to be observed thereafter. Since its transportation authority extends to all interstate transportation[3] the Commission could reach direct, as well as wholesale customers, in a Section 5(a) order.

The Commission however insists that its powers to exercise "curtailment" authority are granted by Section 1(b) of the Act, and that it cannot discharge such responsibilities if it must proceed under Section 5 or Section 7 after hearings. (Brief for Commission at 26, 31.)

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[3] Panhandle Eastern Pipe Line Co. v. Public Service Comm. of Indiana, 332 U.S. 507 (1947); F.P.C. v. Transcontinental Pipe Line Co. 365 U.S. 1 (1960); *cf.* F.P.C. v. East Ohio Gas Co., 338 U.S. 464 (1950).

The basic question presented by the Commission's assertion in its brief of "plenary," "comprehensive" "curtailment" jurisdiction is not whether it can authorize reduced service: the question which the Commission argues (pp. 26-32) is whether reduced service can be authorized without any hearings, by a unilateral Section 4 tariff change on the part of the pipeline company, whether or not such tariff change is contrary to existing contracts and prior Commission certificate orders. Our concern is with the lack of procedural safeguards in the Commission's approach.

A. If Pipeline Companies May Make "Curtailment" Plans Effective Under Section 4 Tariff Filings, Irrespective of Contracts or Prior Commission Certificate Orders, Reductions In Service Will Be Dictated by The Best Interests of The Pipelines, Rather Than Commission-Approved Plans to Protect Residential and Commercial Consumers

The Commission claims that if it is compelled to hold hearings as required under Sections 5 and 7, prior to authorizing any curtailment, and that if courts can enjoin curtailment orders entered under Section 4 without hearing,

> . . . priorities would turn on the interpretation of contracts by courts and state regulatory authorities

rather than

> . . . the establishment under the Commission's supervision of a rational system of priorities for the allocation of scarce interstate natural gas supplies based on the needs of all customers . . . (Brief For Commission at 13.)

That argument does not withstand analysis. Under the Commission's approach of permitting pipelines to file curtailment plans under Section 4, which can override pipeline contracts and prior Commission certificates, scarce gas supplies will be allocated for the forseeable future in accordance with the best financial interests of natural gas pipeline companies, rather than the interests of the consumers they serve. Any Commission modification to the pipelines curtailment plan will be made only after protracted hearings, scarcely constituting Commission supervision of a rational system of priorities.

1. The Commission Is Unable to Take Effective Action To Protect Gas Consumers Under Section 4 Procedures.

The Commission has recently held that its power to suspend so-called "curtailment plans" filed under Section 4 is limited to 5 months.[4] The Commission stresses in its brief, that curtailment proceedings are lengthy.[5] It obviously therefore will not be possible for the Commission to decide or even "supervise" the merits of curtailment plans filed under Section 4 within the statutory suspension period. Consequently, curtailment plans as proposed by the natural gas pipeline companies will go into effect prior to hearings or Commission approval, even though they override existing contracts with direct *and* resale customers. Where the contract has been previously approved by the Commission in a certificate proceeding, which is true in almost all cases,[6]

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[4] Order Denying Request of Altanta Gas Light Company for Partial Stay, Southern Natural Gas Company, No. RP72-74 (F.P.C. March 24, 1972).

[5] P. 31. The curtailment proceeding for United has already lasted more than 18 months.

[6] The United case is unique in that it involved a number of direct sales that had not been previously authorized in Section 7 proceedings.

overriding the contract terms likewise contravenes prior Commission certificate orders.

For a given pipeline, the allocation of supplies among its resale and direct customers is the cumulative product of prior certificate cases, in which the Commission has necessarily made the statutory findings that the pipeline was "able and willing properly . . . to perform the service proposed" and that such service was "required by the . . . public convenience and necessity." (§ 7(e).) Accordingly, a rational method of allocation already has been provided by the certification process pursuant to Section 7 of the Act. Any modification of gas allocation should also be effected under this section, specifically Section 7(b), which provides for abandonment of service only after due hearing.

Whenever the Commission permits a pipeline to set aside (by a unilateral tariff filing under Section 4) this previously determined allocation of supplies under contracts and prior certificate orders, it substitutes the pipeline's plan of curtailment for that which the Commission previously determined to be required by the public interest. Since there are no standards whatever in Section 4(d) which are applicable to curtailment filings and which for example would require pipelines to maintain contractual priorities for their *firm* contract requirements or demonstrate why these priorties must be changed in view of the current gas shortage, pipelines are free to make "curtailment" filings which suit their own, rather than the public interest. For instance, such filings may shift supplies from utilities, such as Atlanta Gas and Alagasco, who serve "human needs" customers such as homes, hospitals, schools, public buildings and commercial establishments, in favor of direct interruptible industrial sales which are more profitable to the natural

> contracts; it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company, whenever its interests so dictate. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956).

If the long term contract for specified volumes of gas can be overridden in favor a system of priorities proposed by the pipeline which will be in effect for an indefinite period of time the gas distributor is placed in the position of being responsible as a purchaser for the full contract volumes while being deprived of the ability to enforce that contract to obtain such volumes. The Commission's scheme not surprisingly, is vigorously supported by natural gas pipelines, including Southern Natural (and opposed by customers), because it makes pipeline contracts a one way street, with no mutuality of obligation.

3. The Refund Remedies of Section 4 Are Totally Inadequate to Protect Customers of Pipelines from Unfair Curtailment Plans.

Even in rate proceedings the effectiveness of the refund remedy to protect consumers is limited. *Tennessee Gas Transmission Co. v. FPC* 371 U.S. 145 (1962). In a curtailment case the refund provision is useless. There is no practical way to refund gas. Once a curtailment provision goes into effect, utilities have no way of recouping their losses caused by reduced overall supplies and the

concommitant loss of sales and potential loss of customers.

In times of natural gas shortage the financial interests of the pipeline are served best by shifting gas from lower-priced sales to higher-priced sales, a procedure that is enhanced by the Commission's invitation in Order 431 to ignore contract limitations in curtailment filings. Even though the pipeline ultimately may be required to refund a portion of the demand charge collected from utility customers for failing to deliver the contract volumes, the ability to sell gas at higher prices to other customers offsets the exposure to refund liability.

While the Commission suggests in its Brief (at 30) that customers might recover damages where an unlawful curtailment plan is placed into effect under Section 4, the Commission lacks any reparation powers under the Act. *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944). Consequently, if damages are to be recovered, it may be necessary to bring civil suits for breach of contract, which the Commission claims cannot be entertained because of its "plenary curtailment jurisdiction." Further the Commission's Order 431 purports to excuse pipelines from performance of contracts rather than exposing them to damages for non-performance.

B. The Commission's Authority Under Sections 5 and 7 Provides Superior Protection for The Public.

The curtailment of gas services is really a question of partial abandonment. *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 177 F. 2d 942, 945 (6th Cir. 1949). Section 4 of the Natural Gas Act is entitled "Rates and Charges, Schedules, Suspension of New Rates." Section 7 is entitled "Extension of Facilities, Abandonment of Service." A curtailment has little to do with rate

changes, yet it is closely related to certificates issued pursuant to Section 7.

Under Section 7 abandonment proceedings, pipelines would be required to specify volumes which they sought to abandon, and the volumes which they would continue to serve. Customers who received reduced gas service could at least know the limits of such reductions. More importantly, the plan may be explored through hearings under § 7, at which customers, their consumers, State regulatory agencies, the Commission staff and other interested parties present evidence and argument which permit the rational determination as to whether the plan is in the public interest. Furthermore, the Commission has broad conditioning powers in Section 7 proceedings which it could invoke to provide a better balance between the interests of pipelines and their customers than is possible under the inadequate refund remedy. Most importantly, once Commission action is taken pursuant to Section 5 or 7, a reviewing court has a record and findings supporting the Commission's actions. If curtailments are permitted without a hearing, the efficacy of judicial review under Section 19(b) of the Act is greatly reduced.

Finally, if a true emergency can be shown, the Commission can issue interim orders under Section 5 or 7. The Commission's authority to issue interim orders under Section 5 is well-settled.[9] Section 7(c) allows issuance of temporary certificates "in cases of emergency, to assure maintenance of adequate service . . ." The power to prevent physical failures of pipelines is conferred expressly by Section 7, and need not be read into Section 4, as the Commission argues (at 26).

It has long been held that an agency may not modify outstanding Certificates of Public Convenience and Necessity unless such modification is authorized by the

[9] F.P.C. v. Natural Gas Pipeline Co., 315 U.S. 575 (1942).

applicable underlying statutory authority. Where such authority exists, the procedural requirements for modification in such certificates must be carefully followed. *U.S. v. Seatrain Lines, Inc.*, 329 U.S. 424 (1947); *Latham Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954); *C.A.B. v. Delta Air Lines, Inc.*, 367 U.S. 316 (1961). Nowhere in Section 4 of the Natural Gas Act is there any reference to modification of Commission-approved certificates, whereas Section 7(b) of the Act specifically provides procedures for abandoning service previously certificated.

The alleged administrative reasons for selecting Section 4 rather than Section 5 or 7 are by no means compelling. Pipelines have the burden of proof in Section 7 as well as Section 4 proceedings. The Commission's contention that the burden of proof imposed by Section 4 justifies adoption of that procedure fails to note that the same burden is imposed in Section 7 cases.

Equally fallacious is the contention by the Commission that Section 4 filings are essential to obviate inconsistent State regulation. The Natural Gas Act contemplates that the authority of State agencies will be supplemented by Federal *regulation;* it does not contemplate that pipelines subject to such regulation have authority to override local controls[10] with plans not yet approved by the Federal agency.

In sum, the procedures contemplated by Sections 5 and 7, requiring hearings before service can be reduced, are not only mandated by the Act but in the long run will provide the best assurance that the underlying purpose of the Act—to prevent exploitation of consumers at the hands of natural gas companies—will be achieved.[11]

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[10] Panhandle Eastern Pipeline Company v. Public Service Commission of Indiana, 332 U.S. 507 (1947).

[11] "The primary aim of the Natural Gas Act is to protect consumers against exploitation at the hands of natural gas companies." Sunray Mid-Continent Oil Co. v. F.P.C., 364 U.S. 137, 147 (1960).

III. THE COURTS HAVE JURISDICTION UNDER THE CIRCUMSTANCES OF THESE CASES TO ENJOIN COMMISSION ORDERS THAT EXCEED THE AUTHORITY AND VIOLATE PROCEDURAL REQUIREMENTS PRESCRIBED BY THE NATURAL GAS ACT.

The Commission argues in this case that there should be absolutely no judicial review of the unilateral filing of curtailment proposals by pipelines that the Commission has permitted to become effective while protracted proceedings before the Commission relating to these proposals are pending.[12] Contrary to the Commission's argument, the Court below used Professor Davis' three-part test and properly held that the courts could consider the issues presented at that time.[13] The test referred to the following three factors in determining court jurisdiction: extent of injury in pursuit of administrative remedy; degree of apparent clarity or doubt about administrative jurisdiction; and involvement of specialized administrative understanding in the question of jurisdiction.

Application of Professor Davis' test necessitates the conclusion that judicial relief was appropriate despite continuing proceedings before the Commission. First, it is quite clear that Southern Consumers and many others will stand to lose millions of dollars from loss of sales and permanent loss of customers and loss of gas as fuel if curtailment plans are permitted to go into effect under Section 4 before any hearing on these matters. Much of these losses will probably be passed on to electric utilities and consumers, since the utilities will be required to utilize more expensive alternate

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[12] Taking the Commission's argument to the extreme, courts would be powerless to act even if the pipeline filed a plan providing for curtailment of customers whose name begins from "A-H", and no curtailment for all others.

[13] United Pet. cert. at 26a. *See* 3 K. Davis, *Administrative Law Treatise*, Section 20.03 (1958).

fuels and since some of these utilities might be forced, because of the loss of gas, to install extremely expensive pollution control equipment. Secondly, a Commission curtailment order under Section 4, before any hearing, which overrides prior contracts and certificates is clearly in excess of the Commission's authority, as shown in the preceding section of our argument. Pipeline curtailment plans that violate not only the Natural Gas Act, but also deprive various pipeline customers of property rights without due process of law, in violation of the Constitution, could be insulated from judicial scrutiny if the Commission's position is sustained. Not only are curtailments implemented before any hearings under the Commission's program, but curtailment proposals are filed under the vague standards of Order No. 431, which was also issued without a hearing.[14] Finally, whether curtailment proposals are sanctioned by contracts between pipelines and their customers (and even whether they are sanctioned by Commission certificate) are primarily legal issues which courts are better qualified to deal with than the Commission. *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960).[15] Moreover, it is not reasonable to assume, as the Commission contends, that courts will exercise their equitable powers in curtailment cases in a manner injurious to the public, particularly where the Commission and other public bodies can intervene. Obviously, much greater injury to the public would result from the alternative advanced by the Commission of permitting private and unrestrained allocation of gas supply by the pipeline companies themselves.

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[14] FPC Order No. 431 cannot validly operate to deprive the parties of a hearing that is required by Sections 5 and 7 of the Act. See Moss v. C.A.B., 430 F.2d 891 (D.C. Cir. 1970).

[15] The Commission has conceded in past orders that its policy is to defer action on contract questions on jurisdictional matters which are pending in court, Rowan et al. v. Allied Chemical Corp., 39 F.P.C. 64 (1968); L.E. Smith et al., 37 F.P.C. 78 (1967).

The Supreme Court has recognized that inadequacy of remedy is a sufficient basis for not requiring the pursuit of exhaustion of administrative remedies: *Township of Hillsborough v. Cromwell*, 326 U.S. 620 (1946); *U.S. Alkali Export Assn. v. U.S.*, 326 U.S. 196, 210 (1946); *Waite v. Macy*, 246 U.S. 606 (1918); *McNeese v. Bd. of Education*, 363 U.S. 668 (1963). Moreover, one need not exhaust administrative remedies where the agency is acting in excess of its statutory powers. In such cases, courts have jurisdiction to enjoin agency orders. *Skinner & Eddy Corp. v. U.S.*, 249 U.S. 447, 462 (1919); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Deering Milliken, Inc. v. Johnston*, 295 F. 2d 856 (4th Cir. 1961). In *United Gas Pipe Line Co. v. F.P.C.*, 181 F. 2d 796 (D.C. Cir. 1950), the court refused to review a rule, issued without a hearing, under Section 19 of the Natural Gas Act. It said, however, that if any agency is acting illegally and threatening irreparable injury, action in the District Court for injunction will lie.

Section 10 of the Administrative Procedure Act, 5 U.S.C., Sec. 706(2)(c) & (d), supplements the statutory review procedure of the Natural Gas Act and other administrative acts when agency action exceeds its authority and does not follow proscribed procedure. *Abbott Laboratories v. Gardner*, 386 U.S. 136 (1967); *Bucks County Cable-TV v. U.S.*, 299 F. Supp. 1325, 1333-4 (1969), *revd on other grounds* 426 F. 2d 438 (D.C. Cir. 1970), *cert. denied* 400 U.S. 831 (1971); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Barlow v. Collins*, 397 U.S. 159, 165-8 (1970); *Data Processing Service v. Camp*, 397 U.S. 150, 157 (1969).

CONCLUSION

Southern Consumers believe this Court should not decide the Commission's entire "curtailment powers" in this case because of its unique factual setting. However, if the Court reaches the broader questions urged upon it by the

Commission, it should find that the Commission has *equal* jurisdiction to curtail services to direct users and purchasers for resale under Sections 5 and 7 of the Natural Gas Act, but that it cannot authorize natural gas pipeline companies to abrogate or reduce their contractual obligations by unilateral filing of curtailment plans under Section 4 of the Act. Finally the Court should not preclude a suit for injunction or other relief in the District Court, where a pipeline company unilaterally files a curtailment plan that violates its contracts with its customers as well as prior certificate orders of the Commission, which the Commission acting beyond its statutory powers nevertheless permits to become effective.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John E. Holtzinger, Jr., an attorney for the parties aforementioned, hereby certify that I have served a copy of the foregoing Motion and Brief Amici Curiae upon the parties to this action by delivering a copy of the same by air mail special delivery to the attorneys of record for such parties.

This 12th day of April, 1972.

John E. Holtzinger, Jr.

SUPREME COURT, U. S.

Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

No. 71-1040

UNITED GAS PIPE LINE CO., ET AL.,
Petitioners,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

BRIEF FOR LOUISIANA POWER & LIGHT COMPANY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION,

Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.

No. 71-1040

UNITED GAS PIPE LINE COMPANY AND
PENNZOIL UNITED, INC.,

Petitioners,

v.

LOUISIANA POWER & LIGHT COMPANY

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR
LOUISIANA POWER & LIGHT COMPANY

I. QUESTIONS PRESENTED

1. Whether a United States District Court has jurisdiction of a suit for an injunction to prohibit the breach of two contracts involving direct sales of natural gas to an industrial customer for its ultimate consumption.

2. Whether a United States District Court has jurisdiction of a suit for injunction to prohibit breach of a contract for the sale intrastate of gas delivered through an intrastate pipeline facility.

II. STATEMENT OF THE CASE

This litigation involves a designed program by Pennzoil-United, Inc., to be conducted by its wholly-owned subsidiary, United Gas Pipe Line Company ("United"), using the Federal Power Commission ("FPC") as its vehicle, having as its overall purpose the obtaining of increased revenues for its product, natural gas. That program has three visible prongs—

(a) The use of temporarily declining gas reserves to create a "shortage" of natural gas, thus providing a pretense of need for "curtailments", laying the groundwork for United's "Curtailment Proceeding," a petition for declaratory order that would permit United to curtail gas deliveries to *all* of its customers. (Appendix Q to this Brief)

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[1] The FPC has prescribed an unacceptable Question No. 1 in that the term "direct corporate users" is meaningless. It matters not whether the user is a corporation, individual, or governmental body; what matters under the Natural Gas Act is whether the direct sale is for resale or consumption. More important, Question No. 1 assumes that this Court is reviewing the various issues in FPC's Curtailment Proceeding when, in fact, this is an injunctive suit alleging breaches of direct gas sales contracts to an industrial consumer.

(b) Contemporaneously with the "Curtailment Proceeding", United filed another petition with FPC, for a certificate of convenience and necessity "authorizing" it to "continue to operate certain pipeline facilities" in South Louisiana that it had been operating for many years. (U. App. 91a)[2]

(c) United's third filing with FPC was for a rate increase that would involve even the customers on the pipeline for which United was then requesting a certificate. (FPC Docket No. RP71-41)

The Curtailment Proceeding was designed to achieve increased revenues by several separate approaches described more fully hereinafter, not the least of which was to allocate its gas in such manner that its existing customers (with low prices) would receive less gas so that United could furnish some of that gas to new customers (at higher prices).[3] The Certificate Proceeding was designed to get United out from under the jurisdiction of the Louisiana Public Service Commission because it could receive more favorable rate treatment with respect to those customers from the FPC. In the words of United's General Attorney: (RP71-29 Transcript Vol. 18, p. 1966)

"Yes, and to come under the jurisdiction of the

[2] "P. App." refers to FPC's Appendix; "R. App." refers to LP&L's Appendix; "U. App." refers to United's Appendix; and "A" refers to the separate Appendix.

[3] Commissioner Carver succinctly described United's activities in his Opinion 610 dissent (at U. App. 128a):

". . . [T]he present effort to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands."

virtually all of United's customers, to such program for the period until March 31, 1971 (A. 260), while protesting the jurisdiction of FPC over its direct sale contracts with United. (A. 259-260) However, on February 22, 1971 United filed a supplemental application with FPC for a fuller curtailment program to cover the period from April 1, 1971 to October 31, 1971. (A. 6-7) When United refused to remove LP&L from that program and honor its contracts with LP&L, this suit was filed on March 31, 1971, the day before United's program was to be effectuated as to LP&L. (A. 3-12)

United continued to make filings in the Curtailment Proceeding from time to time, until the FPC finally issued its Opinion No. 606 (P. App. 48a et seq.) on October 5, 1971, holding that it had "plenary jurisdiction" of the curtailment plan proposed by United or any other pipeline company "relating to transportation both to resale and direct sale customers". (P. App. 74a).

We have stated earlier that United's curtailment program had as its purpose the obtaining of increased revenues for its gas. Among the filings made by United was one on May 17, 1971, proposing to change its tariff by providing for two new categories of service priority in prorating impaired deliveries. This filing proposed that power plant customers paying a rate less than the applicable city gate jurisdictional rate at 100% load factor in the same rate zone would occupy the lowest possible priority . . . *unless* the power plant customer agreed to pay the higher city gate rate. United's General Attorney, Mr. William Cassin, admitted that direct sale customers like LP&L would have to either pay a higher price for

gas or be curtailed pursuant to that filing. (A. 166)

Another filing by United, on March 31, 1971, was designed to limit United's obligations under "substitute fuel clauses" so that United would be relieved of its contractual obligation to pay its customers the difference between the price of gas obliged to be furnished by United and the cost of any substitute fuel that might have to be used a a result of any curtailment by United. Mr. Cassin admitted that this filing by United would also increase the price of fuel to its customers. (A. 167).

Still another proposal by United took place in the so-called "Certificate Proceeding", FPC Docket No. 71-89, calling for an increase in rates to certain customers, including LP&L, characterized as "non-compensatory" customers, which proposal would cost LP&L an additional 6.8¢ per Mcf at Nine-Mile Point, a station that uses some 80,000 Mcf per day. (A. 190-191; LP&L - Wyatt Ex. No. 3) *Just that one proposal by United represents an increase from LP&L alone of some $4,911,089 per year!*

Finally, as an upward thrust upon the United rates there is the original Curtailment Proceeding itself. As early as May 1968 United became aware of a decrease in its reserves and an impending possibility of some gas shortage. [RP71-29 Exhibits 29-31, Transcript 429-444 at 432 (6-15), 437 (3-10) and 443 (14) to 444 (14); FPC Exhibits 3-17, all introduced in the record before the District Court below] Yet, United continued after that time to take on new business. (RP71-29 Transcript pp. 3151- 3153; R. App. 1m - 3m) There is no necessity to belabor this brief with statistics showing that the price of gas has been increasing for the past eight or ten years,

and in fact the FPC is now permitting higher prices in an effort to revive exploration for new gas and bring out some of the existing shut-in gas. Thus, by the mere operation of United's basic curtailment program, without any of the revisions described above, United would receive *more* money for the *same* amount of gas. If A is selling 10 units to B for $2.00 per unit, then changes the transaction to sell only 7 units to B at $2.00 per unit and the remaining 3 units to C, a new customer, at $3.00 per unit, then A has obviously increased his revenues from $20.00 for the 10 units to $23.00 for the same 10 units. That is precisely what United seeks through the "Curtailment Proceeding."

B. The Certificate Proceeding

There has existed for many years in the depths of South Louisiana an integral, self-sufficient pipeline facility owned by United. Its location may be noted by examination of green lines on the map attached hereto as "Appendix P." That facility is commonly referred to as the "Green System" and it is the same facility described in the last sentence of the penultimate paragraph at p. 527 of *Louisiana Public Service Commission v. F.P.C.* 359 F.2d 525, cert. den. 385 U.S. 833, known as the "Florida Parishes" case.

United constructed the line to be an intrastate facility, has operated it as such, and consequently has never applied for a certificate. (See Commissioner Carver's comment on this at U. App. 127a) Not, at least, until it had become obvious, as admitted by United's General Attorney, that regulation by FPC would result in more favorable treatment than that accorded by the Louisiana

Commission. Accordingly, after illegally introducing small quantities of jurisdictional gas into this system, United filed its "Certificate Proceeding" in October 1970, requesting a certificate of convenience and necessity to permit it to continue operating the Green System. (P. App. 53a) Thus, United was requesting FPC to declare the Green System an interstate facility and take jurisdiction. The FPC granted United's request, holding in its Opinion 610 (over vigorous dissent) issued on February 9, 1972[5] that the Green System is an interstate facility over which it has jurisdiction, and remanded the proceeding to its Hearing Examiner for "initial decision" following receipt of additional evidence. Petitions for rehearing were filed on March 6, 1972, and upon FPC failing to act on those petitions within the 30-day period required by its Rules, Opinion 610 became final and was appealed to the Fifth Circuit by LP&L on April 7.

C. This Injunction Suit

In November 1970 LP&L intervened without avail in United's Curtailment Proceeding to the limited extent of protesting the FPC's jurisdiction of its direct sales contracts with United, and acquiesced in United's first curtailment program upon finding that it would have no effect on LP&L. However, on February 22, 1971,

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[5] FPC's brief (p. 8) says, "The decision by the Examiner was waived." That half-truth implies that the parties desired to bypass the Examiner. The fact is that United moved for waiver, a number of parties protested such waiver, preferring to have an initial decision by the trier of the facts and as a matter of expedition. But the FPC ordered the waiver (U. App. 92a), thus putting the Certificate Proceeding in the same dilatory posture as the Curtailment Proceeding, now pending over 17 months and still in the hands of an Examiner on threshold issues.

United filed with FPC a supplemental application proposing a fuller curtailment program for the period April 1-October 31, 1971. (A. 6-7) When United refused to honor its contracts with LP&L, this injunction suit was instituted in the Western District of Louisiana.

LP&L has a steam electric generating plant in Ouachita Parish, Louisiana, known as the Sterlington Station, consisting of four generating units varying in size from 32,000 kilowatts to 224,000 kilowatts. (R. App. 2j) These units were constructed between 1928 and 1958 when the supply of natural gas in North Louisiana was so abundant as to obviate the contemplation of an alternate source of fuel. (A. 185-186) LP&L's contract with United for supply of gas at Sterlington, as most recently amended, contains a maximum delivery obligation of 25,000 Mcf per day. In that contract there is also an "Impairment of Deliveries" article which reads as follows (R. App. 2j):

> "In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers."[6]

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[6] Upon comparing the "Impairment" article of LP&L's contract with the "Impairment" provision of United's FPC tariff (Appendix Q to this Brief) it will be noted that LP&L is in a more favorable position than United's "jurisdictional" customers. That comparison also holds true for United's other "non-jurisdictional" (direct industrial sale)

The gas to Sterlington is delivered through a United pipeline that is "certificated" by the FPC. All of the gas delivered to Sterlington Station is consumed there by LP&L as boiler fuel. (A. 188) The transaction is thus a classic and typical example of a direct industrial sale.

The circumstances are slightly different at Nine-Mile Point Station, located in southernmost Louisiana, in Jefferson Parish. At Nine-Mile Point there are four units ranging in capacity from 74,000 kilowatts to 750,000 kilowatts. (A. 186) These units were constructed between 1951 and 1971, and, although these are gas-fired units, provision was made for operating with fuel oil on an emergency (36 hours) basis. (A. 186) The contract with United for gas supply at Nine-Mile Point stipulated a maximum delivery obligation of 80,000 Mcf per day, and it also contains an "Impairment of Deliveries" article reading: (R. App. 4j)

> Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of public

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customers (see our Brief, in Opposition to Petitions for Writs, p. 7) which explains why only LP&L of all United's customers sued for an injunction.

In passing, we observe that this clause is clear and unambiguous and, contrary to FPC's suggestion, does not necessitate courts prescribing service priorities. Indeed, the FPC has recognized that contract interpretation is a matter for the Courts. *Rowan v. Allied Chemical Corp.*, 39 FPC 64 (1968)

> utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers."

In addition to the Nine-Mile Point contract being a direct industrial sale, it is also a sale from United's Green System, located wholly in Louisiana, transporting only Louisiana gas unmixed with any gas coming from another state or leaving Louisiana, and consumed by LP&L in Louisiana, and the delivery is thus made from an intrastate facility that has not been finally "certificated" by FPC.

The breach by United of the above described contracts was the basis for LP&L's injunction suit filed on March 31, 1971, the day before United intended to implement its curtailment plan. Once filed, the suit had a fast-moving chronology, briefly as follows:

March 31—Upon informing United counsel that LP&L was going to seek temporary restraining order from the District Court, a lengthy hearing was conducted by District Judge Dawkins. Pursuant to assurances given by United's counsel that the proposed reduction in gas delivery would be minimal (7/10 of 1%) for the April 1 - October 31 period, LP&L withdrew its request for a temporary restraining order and a briefing schedule was agreed upon and set by the District Judge. (A. 101)

April 26—United's dispatcher advised LP&L that United would deliver no more than 47,000 Mcf per day

to Nine-Mile Point Station (although that Station is entitled to 80,000 Mcf). (A. 101)

April 27—LP&L filed a Supplemental Complaint in the District Court, alleging the breach of the previous day (United actually did reduce its deliveries) and renewed its request for temporary restraining order. Again we advised United counsel of our intention to seek a T.R.O. and another lengthy hearing was held before Judge Dawkins,[7] at the conclusion of which he issued a temporary restraining order enjoining United from curtailing any gas deliveries to LP&L contemplated by the contracts. (A. 111)

April 28—FPC intervened and filed a motion to dismiss on jurisdictional grounds (A. 113), and United filed a similar motion the following day. (A. 115)

April 29—Without any hearing whatsoever, the District Judge dissolved the restraining order and dismissed LP&L's suit for lack of jurisdiction. (A. 116)

May 1—LP&L filed with U. S. Court of Appeals for the Fifth Circuit application for writs of mandamus and certiorari and alternatively for expedited appeal, and a motion for injunction pending appeal. This date was a Saturday and no contact was successful with either United or FPC. The matter was submitted to the Circuit Judge to whom it was allotted, Judge John Minor Wis-

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[7] Despite our suggestion to desist, FPC has again in its Brief (p. 9) (as it did in its Petition for Writs) characterized the hearing of April 27 as "*ex parte*." That characterization is as mendacious as it is irrelevant. United and Pennzoil (the two named defendants) were represented by several counsel, and, in the words of the District Court, the matter was "heard contradictorily." (A. 111) This is really of no moment to a case as important as this, but we believe the record should be straight.

dom. He reinstated the restraining order of April 27 pending consideration of the application for writs. (A. 117)

May 5—A two-hour hearing was conducted in San Antonio, Texas, by a panel of Circuit Judges Wisdom, Coleman, and Simpson, at which all parties fully participated. (A. 120)

May 14—The Court of Appeals vacated the District Court judgment of dismissal, remanded the case to the District Court for expedited hearing on the jurisdictional issue, and continued the stay issued on May 1 in effect pending hearing and judgment by the District Court. (A. 21)

May 27—District Judge Scott[8] conducted a hearing on the jurisdictional issue pursuant to the FPC and United motions, at which hearing the FPC and United presented a full case, including two witnesses, many exhibits, and the transcript of the FPC Curtailment Proceeding. (A. 138-182)

June 30—The District Court dismissed LP&L's suit on jurisdictional grounds. (A. 266-267)

Thereafter, upon expedited appeal by LP&L, the Court of Appeals heard argument on November 18, and issued its decision on January 14, 1972, reversing the District Court and remanding the case for hearing on its merits. (P. App. 1a - 29a) From that decision the writ herein was granted on March 6, 1972.

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[8] We requested Judge Dawkins to recuse himself, and he did so.

It is essential, before leaving the subject of LP&L's suit, that it be understood that LP&L's injunction suit did NOT name the FPC as a party; it did NOT seek to attack in any manner or affect in any way the FPC-United curtailment proceeding, and indeed the only effect upon such curtailment proceeding would have been, and is, the removal of LP&L (and indirectly any other direct industrial customer) from such proceeding. (A. 2-11, 101-104) Of course, as pointed out in Footnote 6 hereinabove, the removal from the curtailment proceeding of the direct industrial customers (other than LP&L) will not affect the curtailment proceeding because their contracts give them no advantage over United's filed tariff.

III. SUMMARY OF ARGUMENT

1. re: Direct Sale Issue

This controversy involves an effort by a private party, United, to use a contrived "shortage" of gas, and a manipulation of pipeline facilities from State to Federal regulation, both moves accomplished through a willing administrative agency, the FPC, United's purpose being to increase its revenues and FPC's purpose to extend its jurisdiction into an area repeatedly requested from, and rejected by, Congress. FPC Commissioner Carver has aptly described United's maneuvers as:

> "[T]he present efforts to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise."

Two of the contracts Mr. Carver referred to are those at issue in this suit, the direct sales of gas to LP&L for its consumption. To prevail in this suit, United and the

FPC[9] ask this Court to extend FPC's jurisdiction to such direct industrial sales for consumption and extend FPC's jurisdiction to *intra*state pipeline facilities. Such extensions of jurisdiction would do violence to the language of the Act, would contradict its legislative history, would be in conflict with settled jurisprudence of this Court, and would be at odds with all pertinent equitable considerations.

The jurisdictional boundaries of the Act are set forth in Section 1(b). After saying the Act shall apply to "the sale in interstate commerce of natural gas for resale", that section says that it shall not apply "to any other . . . sale of natural gas." This Court has held that language to mean,

> "Direct sales for consumptive use of whatever sort were excluded."

Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507, 68 S.Ct. 190 (1947). However, FPC says it should have jurisdiction by reason of Section 1(b) making the Act applicable to "transportation of natural gas in interstate commerce." Attempting to strain "transportation" to cover direct sales would make a self-contradiction of the direct sale exemption: On one hand, the proviso in Section 1(b) says that "*any* other sale" is exempt, while FPC on the other hand is saying *only* those direct sales transported *intra*state should be exempt.

FPC's "transportation" theory is overwhelmingly con-

[9] The positions and arguments of FPC include all of those advanced by United, and we will accordingly hereafter refer only to FPC for easier consideration.

tradicted by the legislative history. Every debate and report of Congress consistently indicated the intention to exempt direct industrial sales even when the gas is carried through *inter*state facilities. A fair example is provided by House Report No. 709, 75th Congress:

> "The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character. . . . There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction."

The decisions of this Court are irreconcilably opposed to FPC's "transportation" argument. In *Panhandle-Indiana*, a case involving a State effort to regulate terms of service as well as the sale itself, this Court held that *all* direct sales for consumptive use were exempt from FPC jurisdiction. Even more dispositive is *F.P.C. v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 81 S.Ct. 435 (1961). That case involved a certificate proceeding for transportation of direct sale gas. Chief Justice Warren re-affirmed that a direct sale "is not subject to the Commission's jurisdiction except insofar as §7 requires the Commission to certificate the transportation of gas pursuant to the sale", i.e., an *initial* sort of jurisdiction, and then unequivocally ruled that FPC—

> ". . . can *only* exercise a *veto power* over proposed transportation . . ." (Emphasis ours)

and rejected the "complete allocation power" sought by FPC there . . . *and here.*

All pertinent equitable considerations are at odds with the FPC contentions. FPC has repeatedly asked Congress

for authority over direct industrial sales, including curtailment and allocation power, most recently in 1970, and Congress has refused each time. *One of the most convincing evidences of an agency not having jurisdiction is its own admission that it has none.*

In terms of "human needs" FPC's desire to adopt "comprehensive curtailment policies" is not in Louisiana's best interest. What FPC terms an "inferior" use (boiler fuel) is not inferior in Louisiana where the prime need for fuel is to *cool* homes, hospitals, schools, and plants and that is done with electricity made from gas. Nor is there any basis for FPC's sudden concern with human needs since the objective facts at hand indicate there is gas available (Federal Register, Vol. 37, pp. 5844-45) in sufficient quantity to permit distributing companies, like Long Island Lighting Company, to predict the ability to "meet all the demands for gas by its firm gas customers." (Appendix S)

Finally in terms of equity, construction of huge generating plants must be carefully planned since, as is the case here, from $30,000,000 (at Sterlington) to $84,000,000 (at Nine-Mile Point) is invested. A firm supply of fuel must be assured. Acting on the state of law and jurisprudence, LP&L was assured of a firm supply of gas, and FPC has offered nothing to justify disregard of the Act and this Court's decisions.

2. The Green System

A glance at the folded map (Appendix P) at the rear of this Brief will give a good understanding of the location and configuration of the "Green System." It is

obviously an integral, separate pipeline facility located wholly within Louisiana and among and over some of this Nation's largest gas fields. This Green System was designed and constructed as an intrastate facility and has been serving LP&L at Nine-Mile Point since at least 1959 without any FPC certification. It was specifically excluded from jurisdictional consideration in the *Florida Parishes* case. (*Louisiana Public Service Commission v. F.P.C.*, 359 F.2d 525, at 527) Yet, United in October 1970 filed a "certificate proceeding" to change the jurisdiction of this facility from the Louisiana Commission to FPC. In order to lay a basis for such change, United in 1970 dumped a small amount of gas from an interstate facility (the "Black System") into the Green System.

The jurisdictional status of the Green System was raised in the District Court by FPC's motion to dismiss. The issue was fully tried, and through United's own witnesses it was shown that the Green System was entirely separate from the Black System, operated at lower pressure, no gas could reach the Black System from the Green System, and the only way that gas could get from the Black to Green System was by United deliberately manipulating valves. It was also shown that a producing company under the same control as United has sufficient gas available for use in the Green System to obviate the movement of any Black Gas into the Green System.

On those facts the Fifth Circuit held that "the channel of constant flow is intrastate." Upon the tests prescribed in *California v. LoVaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486, the Fifth Circuit should be affirmed.

FPC has argued that LP&L should have been required to exhaust its administrative remedies re the Green System. That contention is now mooted by FPC's Opinion 610 becoming final and having been appealed on April 7, 1972. In addition, FPC's contention on exhaustion is contra to *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 69 S.Ct. 1251. Finally, FPC cannot grant injunctive relief or award damages, and thus cannot provide LP&L an adequate remedy. Inadequacy of remedy has been recognized as a sound basis for not requiring exhaustion. *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445.

IV. ARGUMENT

Federal jurisdiction being invoked here on grounds of diversity of citizenship and for breach of contracts involving the requisite jurisdictional amount, the motions of FPC and United to dismiss were grounded in the proposition that the FPC had either exclusive or primary jurisdiction, and that, in the latter event, LP&L was required to exhaust its administrative remedies before proceeding to court. Of course, the syllogism is incontestable that if FPC lacks jurisdiction, then it has no remedies available, and there are no administrative remedies for LP&L to exhaust. Manifestly then, if these contracts are for direct sales to an industrial customer for consumption, and such sales are exempt from FPC jurisdiction as held by the Court of Appeals, its decision should be affirmed. Similarly, but separately from the direct sale issue, if the gas supply at Nine-Mile Point is delivered from an intrastate facility, then the FPC has no jurisdiction and the decision of the Court of Appeals to that extent should be affirmed.

1. The Direct Sale Issue

The FPC argument in essence is that it has plenary jurisdiction arising out of Section 1(b) of the Act (15 U.S.C. §717, *et seq.*) that includes direct industrial sales, said jurisdiction stemming from its "transportation" authority. That argument is in conflict with the plain language and structure of the Act; in contradiction of the clear legislative history; diametrically opposed by the decisions of this Court and the interpretations of those decisions by the various Courts of Appeal; and at odds with all of the pertinent equitable considerations,

a. The Language and Structure of the Act

Section 1(b) of the Act is the provision that spells out the jurisdictional boundaries of the FPC. That section reads:

> "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, and to natural gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas" (Emphasis added)

Because the States had been regulating certain aspects of the gas industry, and Congress was attempting to preserve that regulation while closing the regulatory gaps beyond the reach of the States, that jurisdictional

section was carefully drawn in 1938 to specifically describe the areas to be regulated by FPC and specifically reserve to the States those areas of regulation they had covered or could feasibly cover. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, at 514-516, 68 S.Ct. 190, 194-195 (1947). Direct sales to local consumers involving gas transported through interstate pipelines were recognized as an area of permissible State control. *Pennsylvania Gas Company v. Public Service Commission*, 252 U.S. 23, 40 S.Ct. 279 (1920). For that reason, Section 1(b) was designed to specifically leave the direct sale area to State regulation. In the words of this Court in *Panhandle-Indiana*:

> "This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.
>
> The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act 'shall not apply *to any other . . . sale . . .* (Emphasis added) Those words plainly mean that the Act shall not apply to any sales other than sales 'for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' *Direct sales for consumptive*

> *use of whatever sort were excluded.*" (Emphasis added)

In order for the FPC contention to be correct, i.e., that it has jurisdiction of these LP&L contracts because of the language in Section 1(b) that this "Act shall apply to the transportation of natural gas in interstate commerce", it would have been necessary for Congress to have worded the conservatory proviso to read:

> "but shall not apply to any other transportation or *to the intrastate* sale of natural gas *for consumption*" (Emphasis indicates wording necessary to support FPC contention)

That becomes evident upon realization that FPC is urging that "transportation" does not mean just "transportation", but also includes "direct sale for consumption" if the sale is effectuated through use of an interstate pipeline. Putting it another way, FPC is claiming that the only transactions beyond its jurisdiction are direct sales through *intra*state facilities. It is too plain to harbor an argument that Congress knew in 1938 of the *Pennsylvania Gas* case and knew that frequently direct sales were accomplished through the use of interstate pipelines. If the Act were designed as the FPC argues, the proviso in Section 1(b) would, in the light of that Congressional knowledge, have had to contain a restriction on the exemption for direct sales; otherwise, the direct industrial sale exemption would be a self-contradiction because it says on the one hand that "*any* other . . . sale of natural gas" is exempt, and the FPC on the other hand is saying that *only* those direct industrial sales transported *intrastate* are exempt.

The other possibility of the FPC contention having any validity would lie in reading the proviso in such a way as to treat "transportation" conjunctively with "sale", i.e., "but shall not apply to any other transportation *and* sale of natural gas", rather than disjunctively. By coupling "transportation" with "sale", it could be argued that the direct industrial sale exemption applied only to a sale accomplished through intrastate facilities. But this Congress did not do.

It must be therefore concluded that the FPC argument re: transportation is in conflict with the plain language of the Act.[10]

b. The Legislative History

There is a noteworthy absence in FPC's brief of any reference to the legislative history of the Act. Small wonder! The history of this Act in Congress overwhelmingly contradicts the "transportation" theory espoused by FPC.

The original bill to regulate the transportation and sale of gas in interstate commerce was offered in 1936. The principal report thereon, House Report No. 2651, 74th Congress, 2d Session, from the Committee on Interstate and Foreign Commerce, contained the following passage in explaining the purposes of the bill:

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[10] FPC presents an elaborate discourse (pp. 26-34) in analysis of its authority under Sections 4, 5 and 16 of the Act, and the interrelationship of those provisions all premised on the hypothesis, "If . . . the Act applies under Section 1(b) to the curtailment of deliveries of interstate natural gas to direct industrial customers." (p. 26) In view of the complete invalidity of that hypothesis, as shown above, no response is made to the FPC discourse other than to say plainly that *IF* the Act gave FPC jurisdiction over direct industrial sales for consumption, then obviously FPC would be able to regulate those transactions, including rates and other terms.

> "This bill, if enacted, would for the first time provide for the regulation of natural-gas companies transporting and selling natural gas in interstate commerce. The bill confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce and the sale of such gas for resale to the public, but does not apply to any other sale of natural gas or deprive a State of any lawful authority over the distribution and sale of natural gas locally. *The sale of natural gas for industrial use only is also exempted from the jurisdiction of* the Commission." (Emphasis added)[11]

By the following year the bill had gained impetus, and the Committee on Interstate and Foreign Commerce issued a further report on the bill, then numbered H.R. 6586, in House Report No. 709 of the 75th Congress, 1st Session, a pertinent part of which reads:

> "The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. *The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character* and in the absence of congressional prohibition subject to State regulation. (See Pennsylvania Gas Co., v. Public Service Commission (1920), 252 U.S. 23) *There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction.*" (Emphasis added)

That passage, without more, puts at rest the FPC theory that its "transportation" jurisdiction reaches a di-

[11] The word "jurisdiction" is not qualified. It does not say "*rate* jurisdiction". The exemption is plenary.

rect sale when such sale is made through interstate facilities. Congress obviously was aware of *Pennsylvania Gas*; recognized that the direct sales regulated by the States were at times made through use of interstate pipelines; and stated its unqualified intention to leave such regulation undisturbed.

The floor debate on H.R. 6586 was interesting in that one of the prime inquiries was with respect to direct industrial sales. At 81 Congressional Record 6721 (75th Congress, 1st Session) there appears the following colloquy involving Representative Lea, spokesman for the bill:

> "MR. THOMPSON of Illinois. Is there anything in this bill that would affect the relationship through which the large industrial consumer buys natural gas directly from the pipeline company or agency?
>
> MR. LEA. The question there involved is whether the purchase is for private consumption or resale to the public.
>
> MR. THOMPSON of Illinois. It would be for private consumption.
>
> MR. LEA. If it is for private consumption, *it would not be affected by this act.* If it were for public consumption, the gas rate would be regulated." (Emphasis added)

A few minutes later (at p. 6724), Mr. Halleck of Indiana, another spokesman for the bill, had the floor and this colloquy occurred:

> "MR. HOUSTON. That is right. *When an*

> *interstate company brings gas into a State and turns it over to a distributing company for industrial needs*, it is regulated under this bill?
>
> MR. HALLECK. *If they sell to the industrial user who is to use it rather than resell it, they are not reached by this bill*; but if they sell to a distributor who distributes, say, to commercial users and domestic users, then that commercial use would be reached by this bill."

Again there is the recognition that some direct industrial sales will be made by transportation of gas through interstate lines, and the Congressional intent was clear that such transactions were to be unreached by this Act.

Deserving of note is Senate Report No. 1234, 78th Congress, 2d Session, wherein the then Chairman of the FPC, Leland Olds, submitted an FPC report on gas conservation . . . not rates, but conservation. In that report the FPC opined that there were two defects in its authority under the Act:

> "One is its lack of authority to suspend rates for the sale of gas for resale for industrial use; and the other, the Commission's *lack of jurisdiction to regulate direct sales* of natural gas to industrial consumers." (Emphasis added)

Exhaustive review of the whole legislative history of the Act reveals nothing contrary to the above. Two propositions are entirely evident from this history: First, Congress had no intention of qualifying the exemption of direct industrial sales from regulation by the FPC; no limiting word such as "rate" was used when Congress said such sales were to be "exempt from jurisdiction;" secondly, Congress recognized, indeed emphasized, that

some direct industrial sales were made by means of *inter*state pipelines, and that they should be as exempt from FPC jurisdiction as direct sales made through *intra*state pipelines. This foregoing legislative history completely contradicts the FPC contention that direct industrial sales made through interstate pipelines are within its "transportation jurisdiction."

c. The Decisions of this Court and the Interpretations of Those Decisions by The Courts of Appeal.

It is advantageous to a productive discussion of this Court's decisions to first put the issue here in perspective. LP&L's suit, as mentioned earlier, does not seek to enjoin or hinder FPC in its conduct of curtailment proceedings, but only to require United to deliver the gas for which it contracted. FPC is presenting to this Court a suggestion not at issue here, i.e., that it needs the authority to curtail *all* customers, including direct industrial consumers, in order to make a fair allocation of gas. That issue is plainly for Congress. The issue here is whether FPC has authority to regulate — and so curtail — direct industrial consumers.

A close look at two key decisions of this Court [*Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 68 S.Ct. 190 (1947); and *Federal Power Commission v. Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 81 S.Ct. 435 (1961)] is indicated by the fact that both the FPC and LP&L are relying upon those cases, and the Court of Appeals used them as its guidelines in reaching the decision under review.

Panhandle-Indiana involved an effort by a pipeline com-

pany to make direct industrial sales in Indiana. The Indiana Commission initiated hearings relative to that direct service, and the pipeline company sought to enjoin the Indiana Commission from regulating (rates *and service* were at issue) these direct sales on grounds that these were interstate transactions and the FPC had exclusive jurisdiction. In affirming the Indiana Supreme Court holding that the Indiana Commission had jurisdiction to fully regulate these direct industrial sales, this Court described the dual regulation envisaged by Congress in Section 1(b) and then drew the clear and clean line insofar as relates to the issue here:

> "This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.
>
> "The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act 'shall not apply *to any other . . . sale . . .*' (Emphasis added) Those words plainly mean that the Act shall not apply to any sales other than sales 'for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' Direct sales for consumptive use of whatever sort were excluded.

> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed."

This quoted language is even more meaningful to this case when it is recognized that in *Panhandle-Indiana* the state commission was seeking to *fully* regulate, i.e., not only the rate but the terms of service as well.

The facts in *Transcontinental* were different in that the direct sale aspect there was remote, and transportation was the primary issue. A New York electric utility company contracted with Texas producers for the purchase of gas, and it was to be transported from Texas to New York through Transcontinental's pipeline. This necessitated obtaining a "transportation certificate" from the FPC. The certificate was denied by the FPC on policy considerations, including end-use and price-effect factors in a certificate proceeding. After affirming again that a direct sale "is not subject to the Commission's jurisdiction except insofar as §7 requires the Commission to certificate the transportation of gas pursuant to the sale," this Court turned to the transportation question. Chief Justice Warren found that the FPC did have the authority to consider in a certificate proceeding such matters as end-use and price effects, but that the certificate authority of FPC was limited, and he then said: (at 365 U.S. 17)

> "The Commission cannot order a natural gas company to sell gas to users that it favors; *it*

> *can only exercise a veto power* over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification." (Emphasis added)

The square pronouncement by Chief Justice Warren that the FPC transportation jurisdiction involving a direct sale was limited to "*veto* power" should be dispositive of this jurisdictional issue. But the FPC has desperately grabbed at a straw of dictum from *Panhandle-Indiana* in an effort to overcome the limitation in *Transcontinental*. At the close of the *Panhandle-Indiana* opinion, Mr. Justice Rutledge engaged in an answer to one of the appellant pipeline's arguments that a conflict might arise between State and Federal regulation when interruptions of service arose from weather or other conditions, and it was said that, "Moreover, if such conflict should develop, the matter of interrupting service is one largely related, as appellees say, to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states." That remark was obviously dictum unrelated to the holding in the case. Additionally, there is no way to determine what Mr. Justice Rutledge may have had in mind; the most probable possibility (upon referring to Footnote 23) is that he had reference to those provisions of the Act that contemplate State-Federal co-operation, even in instances where the FPC has no jurisdiction. [Section 5(b), 11, and 17] In any event, common sense tells that the Court could not have been by that one statement granting to FPC a plenary and continuing jurisdiction over direct industrial sales, particularly when such an effect would completely contradict the holding of the case. Moreover,

if that dictum had the effect suggested by FPC, how could this Court have held in *Transcontinental* that the jurisdiction by FPC in a transportation certificate proceeding was limited to a "veto power?" Why would this Court have spent 31 pages to reach a conclusion that within that "veto power" the FPC could consider end uses and price effects, if, as the FPC argues here, its "transportation jurisdiction" is unrestricted and unlimited? For, if that be the case, the Court need not have concerned itself with what matters the FPC could look into for initial certificate purposes since the FPC's jurisdiction would be a continuing one which at all times would include a right to review use and price factors. If the FPC contention here had any merit, and it has such unrestricted allocation power, why did Chief Justice Warren say (at p. 18) that,

> "[I]t is clear that the Commission fully realizes the distinction between the power it enjoys under § 7 *and complete allocation power*." Emphasis added)

For still another decision by this Court holding that a direct industrial sale, even though made through an interstate pipeline, is subject to the *full* regulation of a State commission, see *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 71 S.Ct. 777 (1951).

The decisions of the Courts of Appeal are consistent with *Panhandle-Indiana* and *Transcontinental*. *City of Hastings v. Federal Power Commission*, 221 F.2d 31 (D.C. Cir. 1954), a rate and contract dispute; *Granite City Steel Company v. Federal Power Commission*, 320 F.2d 711 (D. C. Cir. 1963), an allocation case; and *Colorado Inter-*

state Gas Co. v. Federal Power Commission, 185 F.2d 357 (3d Cir. 1950), an attempt to make a gas tariff applicable to direct industrial consumers. These cases uniformly rejected attempts to extend FPC regulation to direct industrial sales, whether the dispute involved rates, contracts, tariffs, or allocation of gas.

Colorado Interstate is an interesting case in that it dealt with an attempt by the FPC to require a pipeline company to make certain of its tariffs applicable to direct industrial consumers. That is precisely what the FPC is seeking to do here, by requiring United to revise its tariffs with respect to allocation to make them applicable to LP&L and others similarly situated. (P. App. 48a-76a) On this score, the Third Circuit in *Colorado Interstate* quoted from the description of jurisdiction in *Panhandle-Indiana*, supra, and then said:

> "Nothing need be added to this clear statement of coverage of the act. When applied to the problem before us it means that the power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress has conferred upon the Commission that body is without authority to compel Colorado Interstate to make its gas tariff applicable to any sales other than those for resale."

It is particularly significant to the instant issues that the tariffs in the *Colorado Interstate* case were not for new customers and thus an initial situation, but were tariffs being revised to cover existing exempt consumers, as is being attempted here.

In summary, the decisions by this Court, and the Circuit Courts' interpretations of these decisions, are consistent in teaching that: (1) Direct industrial sales for consumption are exempt from FPC jurisdiction, and (2) Section 7 proceedings, whether for transportation or sale, are limited to an initial or originating nature, characterized unambiguously by this Court as "only a *veto* power," and rejecting the "complete allocation power" sought by FPC.

d. The Equitable Considerations

(i) Some Recent Legislative History

The FPC says at p. 26 of its Brief that Congress has vested it with authority to deal with the curtailment problem in Section 1(b). If that be so, why the statement by FPC quoted in *Hastings*, at Footnote 3 (221 F.2d, at 33) admitting that it had no jurisdiction over direct industrial sales and that such authority had been sought from Congress without avail. That was in 1954.

No change took place in the Act from 1954 to 1963. In the Congressional Record for June 19, 1963 there appears a statement from the then Chairman of FPC, Joseph C. Swidler, reproduced fully as Appendix O to LP&L's Brief in Opposition to Writ Applications. Briefly, here are Chairman Swidler's comments about "existing law":

> "Under existing law the Commission's authority is limited to sales for resale in interstate commerce; hence, the price *and other terms* of a direct sale by a pipeline to an industrial consumer are outside the sphere of this Commission's regulatory authority.
>
> * * *

> "For these reasons—protection of industrial consumers, prevention of wide-spread field price increases under existing contracts, and removal of present incentives to withhold gas from local distributors in order to make it available for direct industrial sales—the Commission strongly recommends that it be given jurisdiction over direct industrial sales by natural gas companies. This authority will enable the Commission ~~to~~ require that interstate industrial gas sales will be made at such prices and *on such terms* as to realize the potential benefits of such sales to both industrial and domestic consumers." (Emphasis added)

Notwithstanding, Congress was unwilling to extend the FPC's jurisdiction as urged by Mr. Swidler and S. 1734 failed. Most recently, in its Annual Report to Congress for 1970, the FPC again acknowledged its lack of jurisdiction, *in curtailment and allocation procedings*, over a nonjurisdictional transaction or customer. In that Report (p. 8), the FPC recommended to Congress that it enact—

> "a new subsection to Section 7 of the Natural Gas Act [that] would enable the Commission to determine when an emergency exists so as to require . . . *load curtailment and allocation* of gas by any gas company, whether or not it is otherwise subject to the Commission's jurisdiction."

We submit that one of the most convincing evidences of an agency not having jurisdiction is its own admission that it has no such jurisdiction.

(ii) The "Human Needs" Claim

Running like a thread through FPC's Brief is the claim that it must have plenary authority over curtailments (even where it has no jurisdiction) because only the FPC knows what is in the public interest in the light of *all* contractual arrangements and the needs of *all* customers. Although the statement is an absurdity on its face, it must be considered since it is the foundation of FPC's whole "needs" argument for plenary jurisdiction.

By application of common knowledge, it is undisputably so that (1) in Louisiana the need for energy is principally for cooling and not heating, and (2) this area has no coal or hydro-electric energy closely available. It is obvious under these circumstances that the Louisiana Commission will have a better knowledge of the "public interest" in Louisiana in terms of gas usage than the FPC. What the FPC terms an "inferior" gas use, i.e., for boiler fuel, is not at all inferior in Louisiana where the great need for fuel is to cool homes, hospitals, schools, and plants, and to supply electricity for the operation of sophisticated petro-chemical and mineral plants. Many of those plants are located in Louisiana because of the proximity of gas and oil, just as steel plants have located near Pittsburgh because of its natural resources for steel-making nearby. There can be no doubt that the Louisiana Commission, made up of elected officials, will be more responsive to the needs of Louisiana citizens in allocating the use of gas. Unlike the East and Midwest with coal, oil, and hydro-electric power for alternates, the electric generating plants in Louisiana were constructed for the use of gas almost exclusivly, with only a few having a capability of burning oil as an emergency fuel. (A. 185-6, 243) It is because of that difference in alternatives that

the sales to industrial customers by the pipelines who are supplied by United (the five who are *amici* herein) are for the most part "interruptible" sales, service provided when gas is readily available and which may be interrupted usually at the judgment of the pipeline. Conversely, because of the fuel problems in Louisiana, practically all of United's direct sale contracts are for "firm" service, i.e., a specific obligation by United to furnish a certain amount of gas per stipulated period.

(iii) Is There Really A Gas Shortage?

As Commissioner Carver said, and as we have suggested, United's "curtailment program" actually has another purpose: To extricate it from "improvident" contracts and obtain increased revenues. That immediately suggests the question of whether there is really a shortage, or a shortage of such proportions as to warrant the drastic remedy of violating the jurisdictional boundaries of a Federal statute.

The gas is available. It is just a case of paying enough to bring it out of the ground. During the short period while this Brief was in preparation, there appeared in the Federal Register of March 22, 1972 several notices of applications to the FPC for certificates authorizing the sale for resale of natural gas to United and to Transcontinental Gas Pipe Line Corporation, just those applications for that day aggregating 255,000 Mcf per month. (Pages 5844 - 5845, Federal Register, Vol. 37, attached as Appendix R herein).

At the other end of the pipeline, we have taken what we believe is a fair sampling of the most recently filed Annual Reports of distributing companies, from the New

York area, the Midwest, and the West. (Long Island Lighting Company, Appendix S hereto; Consumers Power Company, Appendix T hereto; Dayton Power & Light Company, Appendix U hereto; and Public Service Company of Colorado, Appendix V hereto) All of those Reports carry the same message on gas supply: Gas is in temporarily tight supply, but all existing demands can be met, and in most instances ordinary growth can be handled. For example, Long Island Lighting says:

> "Despite the curtailments previously mentioned, the Company has every confidence that it will meet all the demands for gas by its firm gas customers.
>
> "Neither the gas supply situation nor the Commission order affect the continued availability of gas for existing residential customers."

And Dayton Power says:

> "The Company's gas sales will continue to increase as additional users, whose service was committed by the Company prior to the sales restrictions, are connected and also as the requirements of existing customers increase. These increased requirements are within the Company's suppliers indicated available delivery volumes."

After announcing that its gas availability is up by 11.2% over the 1970-71 peak day capacity, Public Service Company of Colorado says,

> "The Company, therefore, does not anticipate any unusual problems in meeting normal requirements for natural gas in its service area during the 1971-72 contract year."

The most recent filing by United of its curtailments that we have available, for November 1971, shows that it was delivering *more* gas to its industrial customers than the allocated volume. (See Appendix W hereto)

On the foregoing, we are constrained to assert a serious question as to United's "shortage."

(iv) Importance of Direct Sale Exemption

The construction of a large electric generating plant is a costly venture. For example, LP&L's investment in the Sterlington Station is $30,000,000 and at Nine-Mile Point about $84,000,000. (A. 10) To convert LP&L's generating facilities, including but not limited to Sterlington and Nine-Mile Point, to burn fuel oil and meet air quality standards would cost some $180,000,000. (A. 243) These figures eloquently point up the importance of an industry being assured of a firm supply of gas (or whatever the fuel of the region happens to be) before constructing its facilities. LP&L did so here. It acted on the state of the law that the Act granted an exemption for direct industrial sales, and upon the fact that the pipeline serving it at Nine-Mile Point was an intrastate facility upon which a certificate from FPC was not even necessary. All over this nation, investments have been made and facilities constructed on the basis of *Panhandle-Indiana* and *Transcontinental.* FPC has offered nothng here to justify as a matter of equity the disregard of the language of the Act, its Congressional history, and the decisions of this Court.

2. The Intrastate Situation At Nine-Mile Point

a. The Nature of the Green System

In addition to the direct industrial sale exemption ap-

plicable to both Sterlington and Nine-Mile Point, there is another preclusion of jurisdiction by FPC at Nine-Mile Point: The fact that the gas furnished to LP&L at Nine-Mile Point is produced, transmitted, and consumed wholly in Louisiana. In the vernacular, LP&L is buying "intrastate gas" at Nine-Mile Point. Section 1(b) of the Act exempts "intrastate gas" from jurisdiction. *F.P.C. v. Transcontinental Gas Pipeline Corp.*, supra, at p. 17:

> "Moreover, the Commission has no authority over intrastate sales under any section of the Act."

Upon the following facts, all adduced from United management representatives, the gas received and consumed at Nine-Mile Point is indeed "intrastate gas:"

(a) All of the gas transmitted to LP&L at Nine-Mile Point by United is produced in Louisiana: (A. 212)

> "Q. Mr. Nelson, do you know enough about the system of United to be able to tell me if there is any gas that goes to that green system that is produced in any state other than Louisiana?
>
> A. No, sir. There is no gas produced in another state, other than in Louisiana, going into that system."

(b) All of the facilities (the "Green System") that transmit the gas to LP&L at Nine-Mile Point are located wholly in Louisiana. (See map, LP&L-Belvin No. 1, attached hereto as Appendix P; A. 223)

(c) All gas placed in the Green System is sold by producers to United with the contractual limitation that

the gas not be transmitted out of the State of Louisiana: (A. 213)

"Q. Now, do any of those contracts, that you have with producers, contain what I refer to as a restrictive provision?

A. Yes, sir.

Q. That is provision that restricts the gas that they produce and sell to you to transmission, delivery and consumption, wholly within the state of Louisiana.

A. The contracts that we have on the green system, the number of contracts that we have on the green system have provisions in them that does not allow us to take them out of the state."

(d) The contracts also stipulate that the gas is not to be commingled with gas being transmitted out of Louisiana. (Mr. Belvin's prepared testimony in FPC No. RP71-29, at p. 184, offered in evidence herein at A. 182)

(e) The Green System is an integral, separate, self-sufficient pipeline system. (A. 180)

"Q. Well, let me just describe it another way and we will get it clear. Aren't the pressures in the black system different from the pressures in the green system?

A. Yes.

Q. And in order for gas to get from the black into the green system, you have to turn a valve, do you not, or some kind of meter?

A. You can separate the two with a valve, but there is a measuring device or regulating device to let the gas flow.

Q. What I am getting at, Mr. Echterhoff, as Mr. Belvin told us, under oath that there were valves and regulators, regulating devices such that the green system could be completely closed off from the black system. Now, is that correct.

A. That is correct.

Q. That is what I meant when I talked about being an integral system. Now, in order for somebody to put black gas in the green line, they would have to turn a valve or other regulating devices, do they not?

A. Yes."

(f) And the Green System is capable of keeping and delivering the gas wholly within Louisiana: (A. 221)

"Q. Yes, sir, in fact, that is my next question. You stated, in your testimony, that the green system was, and I am quoting now, 'capable of keeping the gas wholly within the state of Louisiana,' isn't that correct?

A. Yes, sir, that is correct."

(g) For the 12-month period ending July 31, 1970, United put into the Green System the net amount of 155,060,928 Mcf of gas wholly from onshore Louisiana gas fields (LP&L-Barnett No. 2), and delivered all of that gas, minus losses, to customers in the New Orleans District of Louisiana (LP&L-Barnett No. 1). 4,015,000 Mcf, approximately 2.6% of the total, was introduced

into the Green System from the "Black System", a transmission facility that eventually takes some of its gas across State lines. (LP&L-Barnett No. 2)

(h) A wholly-owned subsidiary of Pennzoil-United, known as Pennzoil Producing Company, produces gas in the Lirette and Bay Baptiste Fields in close proximity to the Green System in amounts far in excess of the 4,015,000 Mcf introduced into the Green System by United. (A. 232) Thus, Pennzoil and United have the means available to assure that *all* of the gas going into the Green System does not first have to go through the Black System. (A. 236-237); LP&L-Barnett No. 3; A. 167-168) Consequently, any gas from the Black System that gets into the Green System results from a purely arbitrary choice by United without respect to need, presumably for the purpose of attempting to confer jurisdiction on the FPC.

Unlike the situation in the *Florida Parishes* case, supra, there is no intermixing of *intra*state gas "during transportation with that to be sold *inter*state", only one type of sale (*intra*state) is made from the Green System, and those sales are not "taken from a commingled stream" but from a carefully measured quantity being transmitted through a closed, self-sufficient system of *intra*state pipes.[12]

Instead, because of the foregoing facts, the Fifth Circuit found that the Green System met the tests set

[12] In *Florida Parishes*, 359 F.2d, at 527, the Green System was specifically excluded from consideration:

> "The question under consideration has no relation to United's purely intrastate pipeline facilities which are completely separate from its interstate system and over which the Commission has not asserted jurisdiction."

forth by this Court in *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486 (1965), and that, "The channel of constant flow is an intrastate and not an interstate channel." The holding below was not, as the FPC suggests, based on *de minimis* considerations, but upon the flow concept established by this Court in *LoVaca*.

b. The Exhaustion of Remedies Contention

While the FPC has abandoned its contentions with respect to "exhaustion of remedies" in connection with the direct industrial sale issue (FPC Brief, p. 16), the FPC persists in the exhaustion contention with respect to the question of jurisdiction of the Green System.[13] Relying upon *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459 (1938) and *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U.S. 173, 82 S.Ct. 1237 (1962), the FPC urges that the Court of Appeals unjustifiably refused to defer to the Commission for an initial determination of the status of the Green System.

That contention overlooks the basic fact that the FPC voluntarily intervened in the District Court, and participated fully in the making of a record in an attempt to support its position that the Court should dismiss LP&L's suit because it had no jurisdiction and because the FPC did have jurisdiction. Accordingly, the FPC was a *full* participant in making a *full* record on the status of the Green System. Under those circumstances, we suggest the contention of FPC is disposed of by *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 69 S.Ct. 1251 (1949). In that case, a

[13] It would seem that a similar abandonment is in order as to the Green System in view of FPC Opinion 610 asserting that it has jurisdiction of the Green System being also now on appeal.

pipeline company sold leases covering a portion of its gas reserves without approval of the FPC. The FPC ordered an investigation under the Act of this transfer, and instituted suit in U.S. District Court for a temporary restraining order and preliminary injunction. The district Court initially granted the temporary restraining order, but, after hearing, refused to grant a preliminary injunction. The Third Circuit affirmed, holding that the FPC had no jurisdiction. On that issue, this Court held:

> "To be entitled to judicial assistance, however, the order issued by the Commission must be valid and based on a statutory grant of power to the Commission. As we have held above that the transfer of undeveloped gas leases is an activity related to the production and gathering of natural gas and beyond the coverage of the Act, the authority of the Commission cannot reach the sales. A proposed transfer cannot be stopped by the Commission. It should not be permitted to delay what it cannot prevent."

Similarly here, the Commission cannot certificate a pipeline over which it has been held to have no jurisdiction in a hearing in which it was a full participant in the development of facts. To the same effect, see *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470, 50 S.Ct. 374 (1930); 1b *Moore's Federal Practice* 655, *et seq.*

Even if principles of *res judicata* or estoppel were not applied, exhaustion of remedies would not be required under the circumstances pertaining, for three reasons:

First, the FPC cannot provide an adequate remedy. LP&L seeks injunctive relief and then damages. FPC has no power to grant injunctive relief and no power to

award damages. 15 U.S.C. §717s; *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 69 S.Ct. 1251 (1949). This Court has recognized the inadequacy of remedy as a sound basis for not requiring pursuit or exhaustion of administrative remedies. *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445 (1946); *United States Alkali Export Assn. v. United States*, 325 U.S. 196, 65 S.Ct. 1120 (1945); *McNeese v. Board of Education*, 373 U.S. 668, 83 S.C. 1433 (1963).

Second, the FPC has exceeded its statutory powers. Basic to the exhaustion doctrine is that no pursuit or exhaustion is necessary where the administrative agency is acting in excess of its statutory powers. *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, at 562, 39 S.Ct. 375 (1919):

> "The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

To the same effect, *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180 (1958), which appears to have accepted the criticism of *Myers v. Bethlehem Shipbuilding Corp.*, supra, found in *3 Davis* §20.02, pp. 58-59.

FPC clearly exceeded its statutory powers when it issued Order No. 431 (Pennzoil-United Ex. 13) arrogating to itself jurisdiction in the Curtailment Proceeding over contracts and persons which FPC admitted by its own expression ("non-jurisdictional") were beyond its

powers. FPC further exceeded its powers by permitting and authorizing United to implement its curtailment program with respect to the Green System even though FPC had not at that time reached any decision, no matter how lacking in merit, that it had jurisdiction of that facility.

Third and finally, there is no requirement to exhaust remedies when the certainty of an adverse decision makes exhaustion a futility. FPC issued Order No. 431, assuming jurisdiction of "*non*-jurisdictional" contracts; permitted United to curtail customers on the Green System even though no decision had been reached as to its jurisdictional status; and took the position in this suit that it has exclusive jurisdiction of the two contracts LP&L alleges were breached. (A.114) Under those circumstances it would have been futile to pursue the administrative remedy further. Where such futility exists, this Court has approved an abandonment of administrative remedies in favor of court action. *City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24, 54 S.Ct. 259 (1934).

V. CONCLUSION

The judgment of the Court of Appeals should be affirmed in its entirety.

Respectfully submitted,

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April 12, 1972

APPENDIX P

NEW ORLEANS DIVISION

MAP OF NATURAL GAS PROPERTIES OWNED AND OP

BY

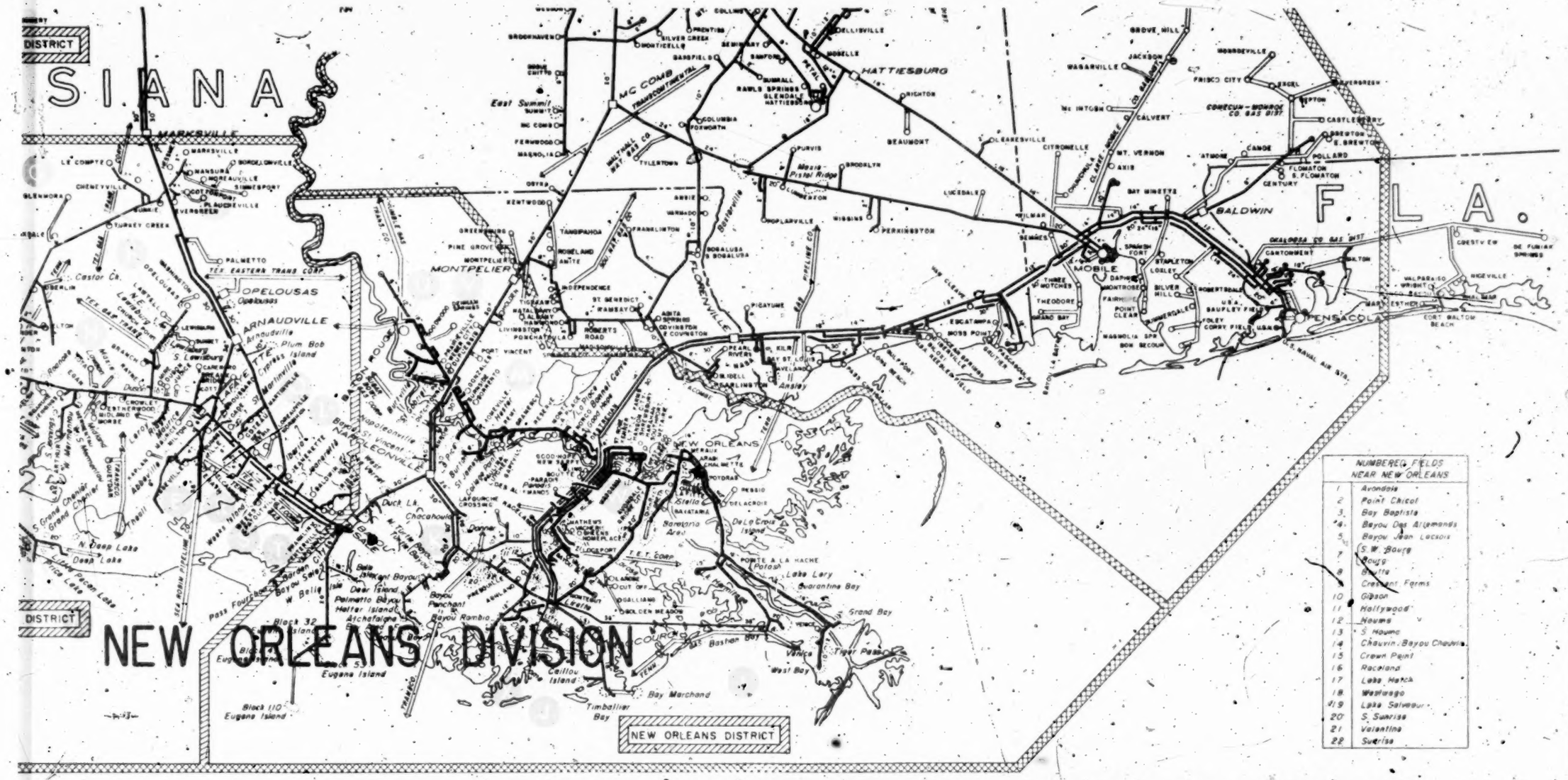
UNITED GAS PIPE LINE COMPA

SHOWING

JURISDICTIONAL STATUS

LEGEND

APPENDIX P



MAP OF NATURAL GAS PROPERTIES OWNED AND OPERATED

BY

UNITED GAS PIPE LINE COMPANY

SHOWING

JURISDICTIONAL STATUS

LEGEND

APPENDIX Q

(#1) 10-26-70

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of)
) Docket No. RP 71-29
UNITED GAS PIPE LINE COMPANY)

PETITION OF
UNITED GAS PIPE LINE COMPANY
FOR DECLARATORY ORDER

Pursuant to Section 1.7(c) of the Commission's Rules of Practice and Procedure and Section 554(e) of the Administrative Procedure Act, United Gas Pipe Line Company (United) hereby petitions for a declaratory order concerning the proper implementation of Section 22 of the General Terms and Conditions of its FPC Gas Tariff First Revised Volume No. 1, pertaining to priorities in the event of impairment of deliveries, in order to terminate controversies and remove uncertainty.

I.

All communications and pleadings in respect to this petition are to be sent to each of the following:

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J. D. McCarty
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United Gas Pipe Line Company
Post Office Box 1407
Shreveport, Louisiana 71102

II.

By Commission Opinion No. 277 issued November 2, 1954,[1/] the Commission issued its order in Docket No. G-1508 directing the filing of United's FPC Gas Tariff First Revised Volume No. 1. Included in the tariff as accepted and filed is Section 12 of the General Terms and Conditions relating to impairment of deliveries which is excerpted in Appendix A hereto. It now appears that during the 1970-71 winter season United will be obliged to curtail deliveries because of the national gas shortage and this curtailment will require implementation of Section 12 of its tariff on a broad scale for extended periods of time. Commencing last summer, United informed its customers of the possibility of this curtailment, and in recent weeks United has informed each customer of United's specific plan to implement curtailments, based on the best information currently available, including specific projected curtailment volumes for the individual customers for the first three months of the winter season.

1/ United Gas Pipe Line Company, 13 FPC 398 (1954).

Most of United's customers have been very understanding and cooperative, recognizing that the current shortage is national in scope and arises from causes over which United has had no control, and also recognizing that United's proposed curtailment program is not only the most equitable program under the circumstances, but also the program which United is obliged to implement under the cited tariff provision and like provisions contained in all of United's direct sale contracts. However, certain of United's customers have expressed strong objections to United's plan of curtailment. United believes that these objections are utterly without merit, but the possible gravity of the consequence of leaving these disputes unresolved has forced United to request that the Commission declare the curtailment plan described herein to be in keeping with the provisions of its filed tariff.

III.

The possibility of curtailment arises not from a shortage of pipeline capacity, but rather from a temporary shortage of field gas supplies. Until recently United had reason to believe that it might not be necessary to curtail deliveries during the coming winter season, since it appeared that United might be able to make spot purchases of gas temporarily available to the interstate market. This gas is presently committed to the intrastate market. It now appears, however, that gas in volumes sufficient to obviate the need for curtailment will not be available at this time on a spot purchase basis and the curtailment program must therefore be made effective on November 1, the first day of the winter season. In any event, such spot purchases, if available at all, could not be made until this Commission completes

the proceeding recently initiated in Docket No. R-404 and an early completion of that proceeding is not presently in prospect.

United must emphasize that the curtailments contemplated by the plan described herein are made necessary by the almost universally recognized national gas shortage. United's position is not unique since almost all interstate pipeline companies have found their supply situation tightening in the recent past as producers have had less and less new gas to commit to the interstate market, while the demand for gas has risen at an unexpectedly rapid and accelerating rate. United is aware of the vigorous actions the Commission has recently taken and has under way at the present time to alleviate this critical gas shortage and United joins in the hope and anticipation that these actions will quickly bear fruit. In the interim, however, it is necessary to administer the curtailment program embodied in United's tariff and direct sales contracts in order that the ill effects of the current shortage may be dealt with expeditiously, equitably and lawfully.

IV.

The curtailment program embodied in United's tariff and direct sales contracts establishes three basic categories of gas use: (1) gas used for industrial purposes, including gas used to generate electricity which in turn is applied to industrial uses, (2) gas used to generate electricity which is consumed by domestic consumers, and (3) gas used by domestic consumers. In the event of a shortage, the program requires that all uses in category (1) be curtailed first and on a ratable basis. If there is still a shortage after total curtailment of category (1) uses, then category (2) uses are to be curtailed ratably. Only if the shortage

persists after total curtailment of categories (1) and (2) will uses in category (3) be subject to ratable curtailment.

Unless United is prevented from applying its curtailment program in the manner contemplated by its tariff and contracts, it will not be necessary during the coming winter to apply ratable curtailments to uses in categories (2) and (3). Thus only industrial uses will be affected, and these only to the limited extent hereinafter indicated.

It should be emphasized that United's tariff and contract provisions governing curtailment expressly provide that the ultimate use of the gas, or energy generated therewith, is the sole criterion controlling priority of service in the event of a shortage. The fact that some of the gas sold by United passes through one or more middlemen, including middlemen who may convert it to a different energy form, is of no significance in applying these curtailment provisions. Consequently gas sold directly to industries by United, gas sold to industries by pipeline customers of United, gas sold to industries by city gate customers of United and United's pipeline customers; and gas sold by United, its customers and its customers' customers to power companies for the generation of electricity for industrial use is to be curtailed on the same basis.

It should also be emphasized that the end use criterion which controls under the cited tariff and contract provisions is an objective standard that does not require extended consideration of comparative hardships and other value judgements inherent in allocation proceedings. Thus, if the facts available to United are correct concerning the end

use of the gas it sells, then the propriety and lawfulness of the curtailment program set out herein are established as a matter of necessity.

V.

In order to implement this curtailment program, United has had to determine what portion of the gas sold to each of its customers is used for industrial purposes. In making this determination, United has utilized a variety of sources of pertinent information. United's own industrial deliveries were obtained from its own records. The industrial deliveries of United's city gate customers were obtained from such customers. The direct and indirect industrial deliveries of United's pipeline customers were obtained from the statistics pertaining to United's pipeline customers and their customers as reported in Brown's Directory of North American Gas Companies (84th ed. 1970). The figures pertaining to the use of gas by United's direct and indirect power company customers for the generation of electricity consumed by industry were obtained from the 1969 annual reports to stockholders of the power companies involved. The resulting curtailable industrial volumes for each of United's customers are shown in the first column of Appendix B attached hereto.

Also shown on Appendix B are the volumes to be curtailed for each customer, with curtailment volumes being related to various projected system shortages which have been graduated in increments of fifty thousand Mcf per day. The increment of curtailment for each customer is subtracted from the customer's total requirements and the resulting daily volume permitted to be taken by each customer at each level of curtailment is set

forth on Appendix B.

As stated above, each of United's customers has been fully advised of the nature of the shortage and United's plan for handling the necessary curtailments. Each customer has also been furnished the specific projected curtailment volumes applicable to it for the first three months of the winter season based on (a) the information reflected in Appendix B and (b) the specific system shortage volumes which United has projected in the manner described hereinafter. The customers have assisted United in refining the data upon which Exhibit B is based and United is not aware of any disagreement concerning such data.

VI.

The final step in planning United's curtailment program for the '70-'71 winter months has been to project the system shortages during such months. The projected shortages are graphically illustrated in Appendix C.

As reflected in Appendix C, United has projected (a) its total system requirements and (b) its total system gas supply during the '70-'71 winter months. The projected supply has two components: (i) field gas supplies, and (ii) storage gas. The volume of storage gas available each day has been computed by establishing a withdrawal curve, which is shown on Exhibit D, with the amount of storage gas available on a given day being the gas in storage on such day in excess of the volume shown on the curve for such day.

United intends to maintain constant surveillance over the requirement and supply variables that determine actual curtailment

volumes as the winter progresses. The projections shown on Exhibit C will be updated on a continuing basis so that curtailments can be held to an absolute minimum. United's customers will be kept constantly advised of the resulting projection revisions and curtailment changes.

For informational purposes, United has extended the period covered by Exhibit C to show United's current projections through October of 1971.

VII.

United is vigorously pursuing its gas acquisition program in an effort to obviate the need for curtailments. This program encompasses efforts not only to obtain long term commitments of substantial reserves to the interstate market, but also to obtain spot gas, as previously discussed, and to obtain more gas from existing supplies by encouraging development and reworking on the part of existing suppliers. These efforts will not be relaxed until this critical problem is solved.

In addition, United for some time has followed the policy of refusing sales to all potential new customers and refusing to sell new volumes of gas to or through existing customers for industrial uses. This policy will remain in force until the current shortage has been cured.

VIII.

The orderly implementation of United's curtailment program obviously requires the cooperation, voluntary or otherwise, of United's

direct industrial customers. Some of these customers have indicated that they do not intend to cooperate with United's program, stating that they do not believe that they are required to do so under their contracts with United. Copies of all of such contracts have been filed with the Commission at the time United has applied to the Commission for authorization to construct the facilities required to make sales to United's direct industrial customers, in accordance with the provisions of Part 157 of the Commission's Rules and Regulations Under the Natural Gas Act. Copies of these contracts are also filed with the Commission for informational purposes under the provisions of Part 155 of the Commission's Rules and Regulations. These filed copies, and particularly the portions relating to curtailment, are by reference made a part hereof. United asks that the Commission's order requested by this petition also declare that the curtailment program set out herein is in accordance with the provisions of its contracts for the sale of gas in interstate commerce to direct sales customers from facilities which this Commission has authorized to be constructed under the provisions of the Natural Gas Act.

WHEREFORE, United respectfully requests the Commission to issue its order declaring that the curtailment program set forth herein is in accordance with the terms of United's tariff, and direct sales contracts.

Respectfully submitted,

UNITED GAS PIPE LINE COMPANY

By_____
J. R. Angell
Vice President

DISTRICT OF COLUMBIA

J. R. ANGELL, being first duly sworn, deposes and says that he is Vice President for the named petitioner; that as such he has signed the foregoing for and on behalf of such petitioner; that he is authorized to do so; that he has read the same and is familiar with the contents thereof; and, that the matters and things set forth therein are true and correct to the best of his knowledge, information and belief.

/s/ J. R. Angell
J. R. Angell
Vice President

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, this 26th day of October, 1970.

/s/ Lida K. Terrill
Notary Public

My commission expires September 14, 1971.

UNITED GAS PIPE LINE COMPANY
FPC Gas Tariff
First Revised Volume No. 1 Original Sheet No. 71

GENERAL TERMS AND CONDITIONS
(Continued)

(EXCERPT FROM UNITED GAS PIPE LINE COMPANY'S TARIFF)

12. IMPAIRMENT OF DELIVERIES

12.1 Proration of Impaired Deliveries - Seller delivers gas to (a) gas utilities, and pipe line companies which deliver gas to gas utilities, for resale to domestic and industrial consumers, (b) steam electric power plants for use in generating electricity which is sold to domestic consumers, and (c) industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its consumers, then, Seller may, without liability to Buyer, prorate its gas supply in the manner hereinafter set forth after first making allowance for all gas required by Seller for the operation of any of its facilities. The gas requirements of gas utilities, and pipe line companies delivering gas to gas utilities, which sell gas to domestic consumers (but only to the extent of gas required for resale to such domestic consumers) shall first be supplied by Seller. If Seller is unable to supply gas for all the requirements of such gas utilities and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then gas for such requirements shall be supplied ratably. In the event Seller is able to supply gas for all the requirements of such gas utilities, and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then there shall next be supplied the gas requirements of steam electric power plants using gas for the generation of electricity which is sold to domestic consumers, whether such power plants purchase their requirements from Seller or from gas utilities or from pipe line companies, purchasing their requirements from Seller; and, if Seller does not have sufficient gas to supply all of the requirements of said power

UNITED GAS PIPE LINE COMPANY
FPC Gas Tariff
First Revised Volume No. 1

First Revised Sheet No. 72
Superseding Original Sheet No. 72

GENERAL TERMS AND CONDITIONS
(Continued)

12. IMPAIRMENT OF DELIVERIES (Continued)

12.1 Proration of Impaired Deliveries (Continued)

plants, then said requirements shall be supplied ratably. After the above requirements have been supplied, the remaining gas supply, if any, shall be prorated by Seller among its other customers, to the extent of gas sold by them to their other consumers. In the event of any shortage of gas as in this Section provided, Buyer shall discontinue service of gas to its consumers during the period of any such shortage to the extent which may be necessary consistent to the provisions hereof.

In certain instances Seller supplies less than the full requirements of certain of its customers, and there may be times when Seller supplies less than the full requirements of Buyer hereunder and it is the intent of this Section that any priority granted hereunder shall run only to that part of the requirements of each ultimate consumer as is being currently supplied by gas furnished by Seller, directly or indirectly.

Issued By: F. V. Barnett, Manager of Rates
Issued On: October 31, 1969

Effective: December 16, 1969

convenience and necessity. If a petition for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for applicant to appear or be represented at the hearing.

KENNETH F. PLUMB,
Secretary.

[FR Doc.72-4395 Filed 3-21-72;8:50 am]

[Docket No. CP72-175]

MICHIGAN WISCONSIN PIPE LINE CO.

Further Notice of Application

MARCH 20, 1972.

Take notice that on January 7, 1972, Michigan Wisconsin Pipe Line Co. (applicant), 1 Woodward Avenue, Detroit, MI 48226, filed in Docket No. CP72-175 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the construction and operation of facilities to increase the capacity of its interstate natural gas pipeline system and to render service under new provisions of its FPC Gas Tariff, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

The proposed facilities have heretofore been described in the notice in the instant docket issued January 21, 1972, and published in the FEDERAL REGISTER on January 27, 1972 (37 F.R. 1269).

Applicant proposes to allocate an additional annual gas supply among its ACQ and MDQ customers in the ratio of their respective current annual gas purchase entitlements pursuant to a proposed new tariff provision included as an exhibit to the subject certificate application. In addition, applicant proposes to modify its tariff to provide present SGS customers an option to purchase gas under applicant's new ACQ-2 rate schedule. Applicant states that the increase in the annual requirements of its SGS customers is not significant and will be met in full within the limits of their maximum daily quantities.

Any person desiring to be heard or to make any protest with reference to said application should on or before April 7, 1972, file with the Federal Power Commission, Washington, D.C. 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 1.8 or 1.10) and the regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's Rules. Persons who have heretofore filed petitions to intervene need not file again.

KENNETH F. PLUMB,
Secretary.

[FR Doc.72-4396 Filed 3-21-72;8:50 am]

[Docket No. CI72-576]

E. RALPH DANIEL ET AL.

Notice of Application

MARCH 20, 1972.

Take notice that on March 13, 1972, E. Ralph Daniel (Operator), et al. (Applicant), 2108 Chamber of Commerce Building, Houston, Tex. 77002, filed in Docket No. CI72-576 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the sale for resale and delivery of natural gas in interstate commerce to Transcontinental Gas Pipe Line Corp. (Transco) from the Johnson Bayou Field, Cameron Parish, La., all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Applicant states that he commenced the sale of natural gas to Transco on February 17, 1972, within the contemplation of § 157.29 of the regulations under the Natural Gas Act (18 CFR 157.29) and that he proposes to continue said sale for 1 year from the end of the 60-day emergency period within the contemplation of § 2.70 of the Commission's General Policy and Interpretations (18 CFR 2.70). Applicant proposes to sell approximately 45,000 Mcf of gas per month at 35 cents per Mcf at 15.025 p.s.i.a.

It appears reasonable and consistent with the public interest in this case to prescribe a period shorter than 15 days for the filing of protests and petitions to intervene. Therefore, any person desiring to be heard or to make any protest with reference to said application should, on or before March 31, 1972, file with the Federal Power Commission, Washington, D.C. 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 1.8 or 1.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by sections 7 and 15 of the Natural Gas Act and the Commission's rules of practice and procedure, a hearing will be held without further notice before the Commission on this application if no petition to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a petition for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicant to appear or be represented at the hearing.

KENNETH F. PLUMB,
Secretary.

[FR Doc.72-4441 Filed 3-21-72;8:50 am]

[Docket No. CI72-577]

CHAS. T. McCORD, JR., ET AL.

Notice of Application

MARCH 20, 1972.

Take notice that on March 14, 1972, Chas. T. McCord, Jr., and Henry Goodrich, doing business as McCord-Goodrich Oil Co. (applicant), 1705 Beck Building, Shreveport, La. 71101, filed in Docket No. CI72-577 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the sale for resale and delivery of natural gas in interstate commerce to United Gas Pipe Line Co. (United) from the Bourg Field, Terrebonne Parish, La., all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Applicant states that it commenced the sale of natural gas to United on March 8, 1972, within the contemplation of § 157.29 of the regulations under the Natural Gas Act (18 CFR 157.29) and that it proposes to continue said sale for one year from the end of the 60-day emergency period within the contemplation of § 2.70 of the Commission's general policy and interpretations (18 CFR 2.70). Applicant proposes to sell approximately 60,000 Mcf of gas per month at 35 cents per Mcf at 15.025 p.s.i.a.

It appears reasonable and consistent with the public interest in this case to prescribe a period shorter than 15 days for the filing of protests and petitions to intervene. Therefore, any person desiring to be heard or to make any protest with reference to said application should on or before March 31, 1972, file with the Federal Power Commission, Washington, D.C. 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 1.8 or 1.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by sections 7

and 15 of the Natural Gas Act and the Commission's rules of practice and procedure, a hearing will be held without further notice before the Commission on this application if no petition to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a petition for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for applicant to appear or be represented at the hearing.

KENNETH F. PLUMB,
Secretary.

[FR Doc.72-4442 Filed 3-21-72;8:50 am]

[Docket No. CI72-568]

ROBERT MOSBACHER ET AL.

Notice of Application

MARCH 20, 1972.

Take notice that on March 10, 1972, Robert Mosbacher et al. (Applicants), 21st Floor, Capitol National Bank Building, Houston, Tex. 77002, filed in Docket No. CI72-568 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the sale for resale and delivery of natural gas in interstate commerce to Transcontinental Gas Pipe Line Corp. (Transco) from the East Perkins Field, Calcasieu Parish, La., all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Applicants state that they commenced the sale of natural gas to Transco on March 6, 1972, within the contemplation of § 157.29 of the regulations under the Natural Gas Act (18 CFR 157.29) and that they propose to continue said sale for 1 year from the end of the 60-day emergency period within the contemplation of § 2.70 of the Commission's general policy and interpretations (18 CFR 2.70). Applicants propose to sell up to 5,000 Mcf of gas per day at 35 cents per Mcf at 15.025 p.s.i.a.

It appears reasonable and consistent with the public interest in this case to prescribe a period shorter than 15 days for the filing of protests and petitions to intervene. Therefore, any person desiring to be heard or to make any protest with reference to said application should, on or before March 31, 1972, file with the Federal Power Commission, Washington, D.C. 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 1.8 or 1.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by sections 7 and 15 of the Natural Gas Act and the Commission's rules of practice and procedure, a hearing will be held without further notice before the Commission on this application if no petition to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a petition for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicant to appear or be represented at the hearing.

KENNETH F. PLUMB,
Secretary.

[FR Doc.72-4443 Filed 3-21-72;8:50 am]

SECURITIES AND EXCHANGE COMMISSION

[70-5163; 68-184]

AMERICAN ELECTRIC POWER CO., INC.

Notice of Proposed Amendment of Certificate of Incorporation To Increase Authorized Shares of Common Stock and Order Authorizing Solicitation of Proxies in Connection Therewith

MARCH 16, 1972.

Notice is hereby given that American Electric Power Company, Inc. (AEP), 2 Broadway, New York, NY 10004, a registered holding company, has filed a declaration with this Commission pursuant to the Public Utility Holding Company Act of 1935 (Act), designating sections 6(a)(2), 7, and 12(e) of the Act and Rule 62 promulgated thereunder as applicable to the following proposed transactions. All interested persons are referred to the declaration, which is summarized below, for a complete statement of the proposed transactions.

AEP proposes to submit to its stockholders at an annual meeting to be held April 26, 1972, a proposal to amend its Certificate of Incorporation to increase from 70 million to 80 million the aggregate number of authorized shares of common stock, par value $6.50 per share. It is contemplated that the additional shares of authorized stock, the issuance and sale of which are to be the subject of future filings with this Commission, will be used (a) to retire AEP's notes to banks and commercial paper notes, heretofore authorized, (b) for equity investments in its operating subsidiary companies, and (c) to permit the acquisition of operating properties or securities of one or more public utility companies. The proposed amendment will require the affirmative vote of the holders of the majority of the 59,500,000 outstanding shares of common stock. AEP intends to solicit proxies, which are to be mailed on or about March 20, 1972, the date of record for voting eligibility, from its common stockholders to obtain the requisite approval of the proposed amendment. AEP proposes to make telephonic, telegraphic, or personal solicitation to some stockholders through its officers and regular employees.

A statement of fees and expenses of AEP to be paid in connection with the proposed amendment will be filed by amendment. It is stated that no State commission and no Federal commission, other than this Commission, has jurisdiction over the proposed transactions. AEP has filed its proxy solicitation material and requests and the effectiveness of its declaration with respect to the solicitation be accelerated as provided in Rule 62.

Notice is further given that any interested person may, not later than April 14, 1972, request in writing that a hearing be held on such matter, stating the nature of his interest, the reasons for such request, and the issues of fact or law raised by said declaration which he desires to controvert; or he may request that he be notified if the Commission should order a hearing thereon. Any such request should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of such request should be served personally or by mail (airmail if the person being served is located more than 500 miles from the point of mailing) upon the declarant at the above-stated address, and proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. At any time after said date, the declaration, as filed or as it may be amended, may be permitted to become effective as provided in Rule 23 of the general rules and regulations promulgated under the Act, or the Commission may grant exemption from such rules as provided in Rules 20 (a) and 100 thereof or take such other action as it may deem appropriate. Persons who request a hearing or advice as to whether a hearing is ordered, will receive notice of further developments in this matter, including the date of the hearing (if ordered) and any postponements thereof.

It appearing the declaration regarding the proposed solicitation of proxies should be permitted to become effective forthwith pursuant to Rule 62:

It is ordered, That the declaration regarding the proposed solicitation of proxies be, and hereby is, permitted to become effective forthwith pursuant to Rule 62 and subject to the terms and conditions prescribed in Rule 24 under the Act.

making an important contribution in reducing the dollars and manpower required to coordinate work on the underground gas distribution system resulting from the long-term sanitary sewer construction program now in progress in both Nassau and Suffolk Counties. This public works program, coupled with new regulatory requirements for gas facility inspection programs, has greatly increased the work load for our personnel.

These developments are successfully holding down cost growth and keeping manpower requirements to a minimum. Despite these improvements in new construction, the cost of converting most or all of our existing overhead lines to underground would be tremendous, running well in excess of a billion dollars, and the costs to each individual customer would be substantial.

It must be recognized that where undergrounding has been achieved other problems present themselves. Underground cable fault location and repair takes considerably more time than equivalent overhead repairs. LILCO now has a mobile "RUD Van" containing special equipment and devices which can locate underground faults and temporarily restore service to the affected customers while permanent repairs are made. The time required to restore service to customers has thus been significantly reduced on many occasions.

Gas Supply

The volume of natural gas being shipped to Long Island by our pipeline suppliers has been curtailed recently because of the lack of development of new gas fields by gas producers. The producers claim that there has been insufficient financial incentive to develop additional supplies to match the growing nationwide demand because prices have been kept low under regulation.

This gas supply problem is not peculiar to Long Island. It is being experienced throughout New York State, in most eastern seaboard cities, and by other cities across the United States. The development of new gas supplies is being intensively pursued but it will be some time before firm plans for additional volumes of gas can be announced.

Keenly aware of these facts, the Public Service Commission, in a decision applicable to all gas companies in New York State dated October 26, 1971, concluded that: it is imperative that certain restrictions be imposed without delay on the attachment of new customers and on increased sales to existing customers; that an order of priorities be established in the event service must be curtailed; that pending a substantial improvement in the supply situation, sales promotion activities for the purpose of attracting new or additional

After gas goes through this cold tower it is stored as a liquid in one six-hundredth of its original space . . . for later use. The equivalent of 600 million cubic feet of gas can be stored in this facility. In this way, LILCO plans to meet, in part, the growing demand for energy on Long Island.

load be discontinued; and that all jurisdictional companies rendering gas service submit, detailed plans, within 60 days, for new or additional peak shaving facilities or advise the Commission why such equipment is not proposed to be installed.

LILCO has devised such plans in keeping with a well conceived order of priorities to minimize the impact on its customers. The Company has contracts for the delivery from its pipeline suppliers of 174.1 million cubic feet per day of firm gas and 130.5 million cubic feet per day for peaking capability during the heating season. It also has facilities to manufacture 80.0 million cubic feet per day of gas for peaking requirements. In addition, LILCO's liquefied natural gas facility at Holbrook, which began operation in 1971, will hold the equivalent of 600 million cubic feet of gas and will be used to supply up to 100 million cubic feet per day at peak times. Thus, the total peak capability of the gas system is 484.6 million cubic feet per day, well in excess of the experienced peak demand. Despite the curtailments previously mentioned, the Company has every confidence that it will meet all the demands for gas by its firm gas customers.

Neither the gas supply situation nor the Commission order affect the continued availability of gas for existing residential customers.

Not In My Backyard

Everyone wants power but few want the power station in their neighborhood.

The question of siting received increased attention in 1971 both on a State and Federal level, but no resolution of the problem was reached.

LILCO supports the "one stop" approach to help bring order out of the present complications and discord in approving electric generating plant sites. While it has every expectation of receiving the necessary permits for its Shoreham Nuclear Station and for the fourth unit at Northport, it has an understandable ambition to see the present duplicative federal, state and local processes improved and streamlined in the interests of effectiveness and economy, energy and environment. Given the time lag from the conception to the building of power stations, it is clear not only to the Company, but to other observers, that present procedures, if they are not refined and improved, could result in even more serious implications for power production and reliability. The Company expects that the public solutions arrived at on all levels will reflect a proper balancing of both environmental and energy interests. Those decisions should come soon, perhaps in 1972.

PEOPLE

As a business operated by people, employees, for the benefit of two other groups of people, customers and investors, the primary responsibility of LILCO's management is to insure that all three groups of people are treated fairly, since satisfying the interests of each is essential to its success as a utility.

Investors have to realize a satisfactory return on their investment. Employees must receive proper compensation for their services. Customers must receive reliable service at reasonable rates. LILCO's success in satisfying these three publics is demonstrated, in part, by its earnings and dividend records, its high percentage of long term employees, its very low employee turnover rate and its generally appreciative customers.

LILCO's efforts, along with those of other regulated utilities, must also satisfy another very knowledgeable group of people, the experts employed by the regulatory bodies which have jurisdiction over the Company's operations. Thus, a utility like LILCO is a very people intensive, as well as a capital intensive, business.

If the interdependent interests of all these groups are to be effectively served according to a reasonable order of priorities, they, as well as the Company and the government, must work together toward some common objectives of efficiency and economy. This task has been complicated recently by two factors. One, an extremely small but very vocal section of the customer group has emerged, claiming to speak for the public at large, especially on environmental questions. Second, government groups are unintentionally complicating their efforts, sometimes complementary — and other times — competitive, to improve the environment in the face of the need for growing quantities of energy.

APPENDIX T

Natural Gas

The natural gas shortage throughout the nation is acute, but aggressive exploration and development activities promise some relief for Michigan in 1972, with more thereafter. Through its exploration subsidiary, the Company in 1971 participated in productive drilling in Michigan, Louisiana and the Gulf of Mexico. The Company also negotiated successfully for additional supplies from new discoveries in Michigan, and started building the nation's first synthetic natural gas plant.

The efforts of Consumers Power Company to overcome deficiencies in gas supply might well be described by the slogan of a well-known auto rental firm. The Company tried harder. And succeeded.

In addition to its wide-ranging exploration efforts, the Company contracted for long-term supply of liquid hydrocarbons from Alberta, Canada, and began construction of the nation's first plant to convert this liquid feedstock into synthetic natural gas.

These measures were made necessary by a critical shortage in the nation's available supplies of natural gas. So serious is the shortage that the Company's principal suppliers were forced in the spring of 1970 to give notice that they no longer could meet contractual deliveries. Thus, the Company found it necessary immediately thereafter to ask authorization of the Michigan Public Service Commission to restrict future sales of natural gas until more supplies became available.

In consequence, for the first 10 months of 1971 the Company limited the addition of new customers principally to residential users. No additional industrial or commercial customers were accepted, other than those to whom previous commitments had been made.

Meanwhile, however, the Company mounted intensive efforts to find more gas. Its wholly-owned subsidiary, Northern Michigan Exploration Company (NoMECo), undertook an aggressive program of exploratory drilling, both alone and in association with others. The results to date are encouraging.

In the Kalkaska area of Michigan's lower peninsula, NoMECo has half ownership with Amoco Production Company in a gas well, and 100 percent ownership of two oil wells which also produce gas. New transmission lines were constructed in 1971 to bring gas to the Company's distribution system from these discoveries, as well as the discoveries of other producers. As a result, the Company expects to receive more than 10 million cubic feet of gas daily from northern Michigan, beginning in early 1972. In addition, another 10 million cubic feet daily is expected shortly from newly discovered fields in Ingham County, in southern Michigan, where the Company has contracted with the producer, Mobil Oil Corporation. By the autumn of 1972, the Company hopes to be receiving an estimated 70 million cubic feet daily from newly discovered Michigan fields.

In southern Louisiana, NoMECo is associated with Quintana Production Company in development of a substantial portion of the South Gibson gas field, which was discovered in 1970. The acreage under development has estimated reserves available to NoMECo of 260 billion cubic feet, and a potential of delivering up to 60 million cubic feet daily. NoMECo has entered into a contract with Trunkline Gas Company under which Trunkline agrees to transport gas from the South Gibson field to Michigan. This arrangement, however, is contingent on approval of the Federal Power Commission. Reference to intervention by several gas distributors, seeking to block this approval, will be found in the Legal Affairs Section.

In 1971, NoMECo participated with Quintana in drilling discovery wells in southern Louisiana, one in the North Freshwater Bayou Field, and another in the Cherokee Field. NoMECo and Quintana also are participating in one other exploratory project in southern Louisiana.

In offshore exploration in the Gulf of Mexico, NoMECo is associated with several other companies in a group headed by Sun Oil Company. During 1971, 14 exploratory wells were drilled to evaluate certain of the nine tracts under lease involving 45,000 undersea acres. Twelve of these wells, testing five tracts, reached their objectives; and six wells, on four tracts, were successful.

As a result of these discoveries, the group is contracting for an 18-well production platform, to be installed next autumn. Drilling of development

Consumers Power Company

wells is expected to begin in the autumn.

Meanwhile, another important step was taken in 1971 when the Company contracted for a $70 million gas reforming plant, to be built at Marysville, near Port Huron, Michigan, for production of gas by the catalytic rich gas process. Liquid feedstock from Canada—25,000 barrels daily the first year, and 40,000 to 50,000 barrels daily thereafter—will be delivered over a 15-year period starting in 1973. These liquid hydrocarbons will be stored in caverns formed in underground salt formations adjacent to the reforming plant. The facility is expected to begin delivering 100 million cubic feet per day of pipeline quality gas in 1973, equal to about 10 percent of the Company's present gas supplies. In 1974, completion of the plant will bring its output up to about 210 million cubic feet daily.

With prospect of additional gas from northern and southern Michigan, as well as from Louisiana, and the reforming plant under construction, the Company was able to return to the Michigan Public Service Commission in October, 1971, with a request to modify the restrictions of a year earlier. The Commission approved a flexible priority system which will permit the Company to maintain a balance between future gas supplies and demands of customers.

These modifications permit the Company to continue to provide gas service to all residential customers; to honor most of the 2,900 applications pending for service to commercial and industrial users; to permit most existing commercial and industrial customers to fully utilize existing gas equipment; and to accept new small commercial and industrial customers.

The Company continued active participation in the TARGET research program of the American Gas Association, exploring new energy concepts based on the fuel cell using natural gas to produce electricity. The original unit was developed for the Apollo Space Program. A field test power plant fuel cell is to be installed in mid-1972 in Flint, Michigan.

The Company ended 1971 serving 879,535 natural gas customers in 40 counties of Michigan's lower peninsula. These included 815,872 residential, 57,476 commercial, and 6,187 industrial customers. Among residential users, 734,481 heat their homes with natural gas.

An all-time record 24-hour sendout of natural gas was recorded February 2, 1971, when 2.241 billion cubic feet were delivered to the Company's customers. This, in turn, was exceeded in January, 1972 with a 24-hour peak sendout of 2.283 billion cubic feet.

In total, 333.9 billion cubic feet of gas were consumed during the year, an increase of 7.6 percent over 1970. Gas revenues were $286,091,000 for the year, up 4.5 percent over 1970.

Legal Affairs

The problems of government regulation: Can the Palisades plant be operated? Can the Midland nuclear plant be built? Will adequate rate increases be approved? When will the pay board clarify wage and salary regulations? Day in, day out, the Company's legal activities illuminate the problems of the business, particularly the two most serious—getting plants into operation . . . and obtaining adequate rates.

Americans live in a highly competitive world. And they must have adequate supplies of energy at reasonable cost if they are to maintain the nation's viability in that competitive world. Yet regulatory agencies tend to ignore economics, and are reluctant to grant rate increases sufficient to allow the energy industries to attract the capital necessary for continued expansion. Moreover, unrealistic government procedures often delay the construction of urgently needed energy facilities, or result in questionable requirements that substantially increase their cost.

Consumers Power Company regards itself as an early and continuing leader among all utilities in protecting the environment. But it also believes that a better environment must be achieved realistically, with concern for a proper balance between environmental goals and the critical need for expanded energy resources.

For the Company, 1971 was a year in which delay and uncertainty prevailed. When the year had ended, the Palisades nuclear plant operating license issue summed it up.

The electric rate case and the gas rate case also pointed up the problems of uncertainty, as did the frustrating attempts to overcome the delays in obtaining authorization from the Atomic Energy Commission to start building a nuclear plant at Midland.

The complexity of the latter proceeding was further compounded by a group of municipalities and REA generating and transmission cooperatives. They petitioned to intervene on antitrust grounds, contending that, if the plant is to be built, they are entitled to buy a certain guaranteed portion of the plant or its output. Moreover, they seek more favorable interconnecting arrangements, and demand that power purchased from others be delivered to them over the Company's transmission lines.

The obvious purpose of this action is to gain discriminatory and unreasonable advantages. This the Company is resisting, contending that there

APPENDIX U

Sales

Emphasis on Selling Off-Peak Loads

DP&L's marketing program has been directed to achieve greater utilization of the Company's installed facilities and the development of the total economy of West Central Ohio.

During the year, sales efforts were directed to obtaining electric space and process heating, outdoor security and decorative lighting, gas air conditioning and interruptible gas process sales. As a result, a high proportion of the year's new business was off-peak and year-round use loads. Sales achieved during the year represent $12.9 million of additional revenues on an annual basis. This new business includes $8.6 million estimated annual electric revenue and $4.3 million estimated annual gas revenue.

Electric Sales

Electric revenues for the year were $133 million, up 9.6% from 1970. Revenues from residential customers increased by 10.2% with 8,629 new customers being served. The Company's residential customers now use an average of 7,505 kilowatt hours per year, an increase of 313 kilowatt hours per customer over 1970.

The Company now serves over 18,400 electrically heated living units. Over 3,300 additional electrically heated residences were served during the year, an increase of 23%, including 676 existing homes which converted from other fuels.

Commercial electric revenues rose by 9.8% over 1970 with 464 additional customers served in 1971.

Electric heating was installed in 87 commercial buildings. The largest was the new 235,000 sq. ft. structure housing the Air Force Museum, near Dayton. This is Ohio's largest tourist attraction serving over a million visitors each year.

The kilowatt hour sales to industries increased 3.1% over 1970. Such sales to industries in the last quarter of 1971 showed a 13.3% increase indicating an upturn in the economy which is expected to continue in 1972.

Gas Sales

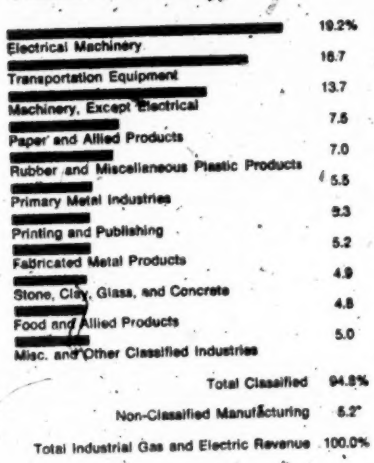
Revenue from sales of natural gas in 1971 was $67.6 million, up $10.8 million, or 19% over 1970. Approximately $5.8 million of this revenue increase resulted from higher gas rate schedules placed in effect in November, 1970.

In 1971, 4,655 new residential customers received gas service. Commercial gas sales increased 2.4% and industrial sales were up 9.2% over the previous year. The increase in industrial sales is partly the result of added interruptible industrial loads. The Company now serves 2.6 billion cubic feet of this type load. Since these loads can be interrupted and will not be supplied on peak days, a further improvement in our gas system load factor is anticipated.

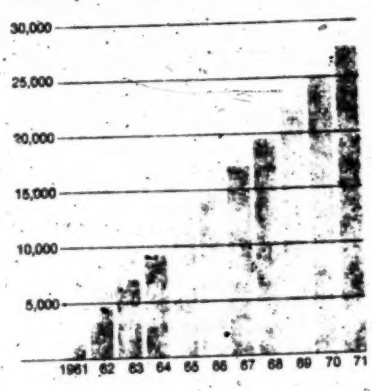
As a result of the critical natural gas supply situation, the Company operated under restricted gas sales policies during most of the year. Such restrictions were necessary to assure that the quantities of natural gas, available to the Company from its suppliers, are sufficient to meet the requirements of existing customers.

The Company's gas sales will continue to increase as additional users, whose service was committed by the Company prior to the sales restrictions, are connected and also as the requirements of existing customers increase. These increased requirements are within the Company's suppliers indicated available delivery volumes.

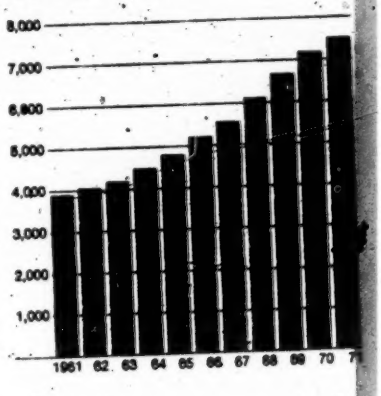
1971 Industrial Gas and Electric Revenue by Standard Industrial Classification



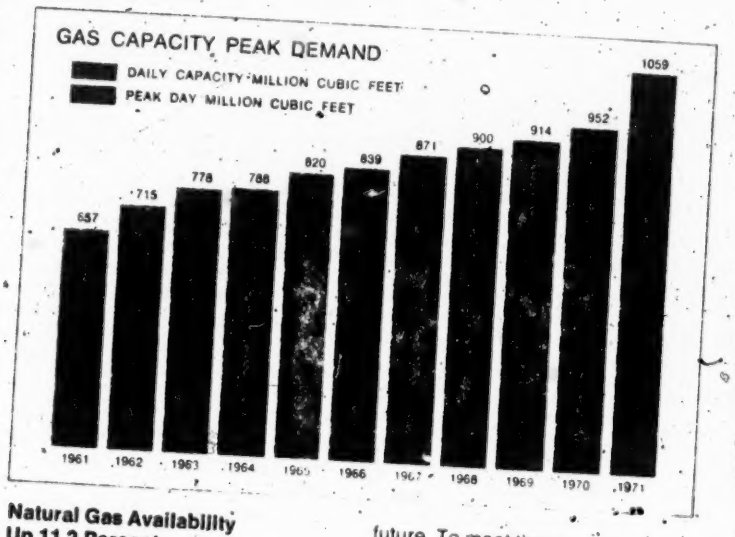
Nightguard Light Installations 1961 - 1971



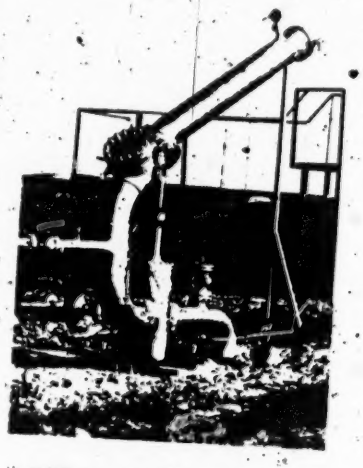
Average Residential Electric Consumption Per Customer 1961 - 1971



APPENDIX V



Efficiency of natural gas facilities is improved by mechanical equipment designed to remove liquids from transmission lines.



Natural Gas Availability Up 11.2 Percent

The Company also obtains gas from El Paso Natural Gas Co., local wellhead production, and Company-owned storage. These sources, plus the gas contracted for from CIG, make available to the Company a maximum of 1,059 million cubic feet of gas per day for the 1971-72 contract year. This is an increase of 11.2 percent over the 1970-71 consolidated peak day capacity volume of 952 million cubic feet.

The Company, therefore, does not anticipate any unusual problems in meeting normal requirements for natural gas in its service area during the 1971-72 contract year.

Gas Reserves Conserved

CIG's existing gas supplies, however, will not support the anticipated future gas requirements of its rapidly growing service area. Its management, therefore, decided to conserve its gas reserves by restricting its annual gas sales to 1972 levels until additional long-term reserves are available. Despite the annual supply restriction, CIG believes it will be able to meet increased firm peak day and annual requirements for the foreseeable future. To meet these requirements, CIG and its resale customers may need to impose a controlled restriction on annual sales to certain of their respective customers. The Company believes that it will continue to have a gas supply adequate to meet the growth of its firm market requirements.

PSCo, at the invitation of CIG, has joined an advisory committee charged with the responsibility of developing new terms and conditions of its tariffs that will implement this sales policy.

CIG is expending every effort to continue to improve its net reserve and deliverability position and plans to increase annual deliveries to its customers as acquisition of additional reserves permits.

New Supplies To Be Connected

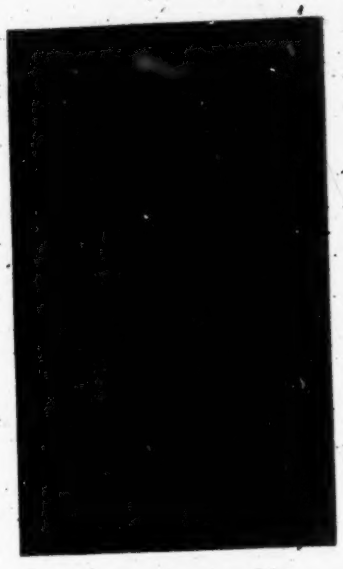
CIG has received Federal Power Commission (FPC) permission to connect its pipeline system to a new supply of natural gas in the Big Horn Basin of Wyoming and Montana. This Big Horn supply, which will enter CIG's transmission system in the fall of 1972, will add 5,301 million cubic feet to CIG's annual supply in 1972, 15,655 million cubic feet in 1973, 15,559 million cubic feet in 1974, and 15,669 million cubic feet in 1975. In addition, CIG, on December 30, 1971, filed with the FPC an application to construct additional pipeline and storage facilities in Colorado, Oklahoma and Wyoming. These new facilities will increase CIG's daily transmission system capacity to 1,305 million cubic feet.

Increased Exploration Necessary

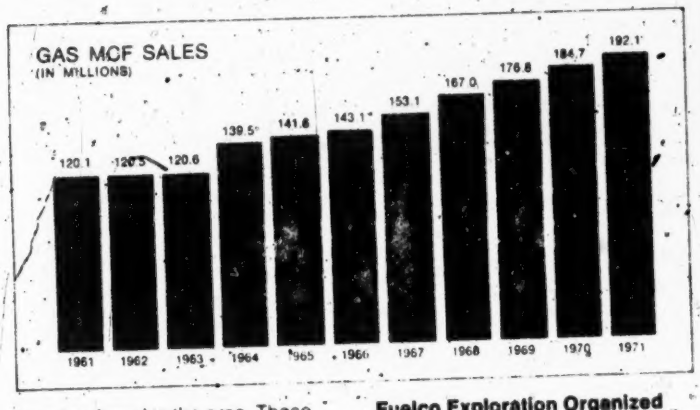
PSCo is cognizant of CIG's gas supply problems. The Company, however, views the current gas shortage as a temporary situation that can be alleviated by increased exploration. The Potential Gas Committee Report of 1971, indicating potential U.S. gas reserves of 1,178 trillion cubic feet, clearly shows that the current shortage is not due to depletion of the resource base.

The overwhelming evidence is that the shortage is due to the lack of financial incentive to undertake drilling ventures to discover and develop these potential reserves.

The FPC, as a result of its own investigation of price levels for natural gas produced in the Rocky Mountain area, issued an order in July, 1971, that establishes higher initial rates for new gas



PSCo's Leyden Gas Storage Project continues to provide peak requirements necessary in meeting the natural gas needs of our customers. Located in an abandoned coal mine 10 miles northwest of Denver, Leyden provided approximately 16 percent of the needs for the 1971 peak day.



supplies found in the area. These new higher rates should encourage additional gas exploration in the Rockies, a region from which a substantial portion of PSCo's gas is obtained.

Colorado Interstate Gas has advised the Company that its anticipated total gas reserve acquisition budget for 1972 will be approximately $11 million, which is three times the 1971 program. Also, PSCo is engaged in exploration and development of additional gas supplies through two of its wholly owned subsidiaries, Fuel Resources Development Co. (Fuelco) and Western Slope Gas Co. (WSG).

Western Slope Gas Acquires Reserves

WSG connected 12 wells to its gathering systems in 1971 in its continuing program to acquire reserves and expand its delivery capacity. WSG now has 186 wells connected to its gathering systems and anticipates connecting at least 16 more wells by mid-1972. At mid-year, WSG completed two purchase agreements that, ultimately, are expected to bring into its natural gas transmission system an average of over six million cubic feet of gas per day from the fast-growing Wattenburg Field north of Denver. Total reserves acquired by WSG during the year amounted to 20 billion cubic feet.

Fuelco Exploration Organized

In its initial year, Fuelco concentrated its exploratory operations in Colorado, Wyoming, and Utah, acquiring a leasehold of 307,160 gross acres in those three states. All four of Fuelco's drilling ventures in Western Colorado resulted in apparent gas producers. Fuelco also participated in ventures with other operators involving the drilling of 11 wells, of which two were successful.

Underground Storage Vital

The peak day deliverability protection and financial advantage afforded by PSCo's Leyden Gas Storage Project, located in an abandoned coal mine 10 miles northwest of Denver, was again demonstrated when this facility provided 155 million cubic feet of gas on the 1971 peak day. Additional Company-owned peak day deliverability was provided when the two-well Fruita Field in Western Colorado was converted to underground storage and connected to the Asbury Storage Complex.

Facilities Expanded

Continued rapid population growth in PSCo's service territory in 1971 with the resultant increase in the number of gas customers has required considerable expansion of the Company's gas distribution facilities.

A $1.3 million construction program completed in November at WSG's West Douglas compressor station increased deliverability of that facility to 30 million cubic feet of gas per day. Gas transmission line reinforcement projects were carried out during the year in the Climax, Rangely, Steamboat Springs and Front Range areas.

Technology Increases Efficiency

The utilization of modern technology and innovations increased efficiency and effected economies in several gas operations. The Company's Gas Control Equipment Department developed a "first-of-its-kind" fiberglas regulator station housing that can be erected in one day, compared to the three weeks required for conventional structures. The housing is designed to blend in with surrounding buildings.

Crew times on the Company's gas leak testing program were reduced by 66 percent with the use of a "Tractair," a self-propelled unit that drills holes for electronic gas-sniffing probes. Using computer equipment, WSG made computer models of its transmission facilities that will help analyze operations and plan future system modifications.

APPENDIX W

W

(FROM UNITED GAS PIPELINE COMPANY REPORT ENTITLED "GAS SUPPLY - REQUIREMENTS - REVISED - NOVEMBER 1, 1971, THROUGH MARCH 31, 1972" DATED DECEMBER 15, 1971)

CURTAILMENTS

NOVEMBER 1971
VOLUME IN MCF @ 14.73 PSIA

	MCF ALLOCATED VOLUME	MCF ACTUAL VOLUME	MCF UNDER (OVER)
INDUSTRIALS			
Air Products & Chemicals, Inc.	997,218	995,609	1,609
Allied Paper Company	249,007	241,492	7,515
Aluminum Company of America	482,047	438,340	43,707
American Cyanamid	192,626	187,098	5,528
American Metals Climax	97,611	101,957	(4,346)
Atlas Processing Company	166,812	151,361	15,451
Boise Southern Company	448,453	479,631	(31,178)
Cities Service Oil Company	2,788,080	2,827,129	(39,049)
Coastal Chemical Company	497,032	496,734	298
Colonial Pipeline Company	93,313	89,433	3,880
Container Corp. of America	243,506	238,890	4,616
Continental Can Company	370,146	364,149	5,997
Corchem, Inc.	102,069	43,221	58,848
Courtaulds North America Inc.	244,684	237,676	7,008
Georgia-Pacific Corporation	112,777	113,155	(378)
Ideal Cement Company	202,590	213,971	(11,381)
International Paper Company - Mobile	128,173	138,286	(10,113)
International Paper Company - Moss Point	371,939	366,892	5,047
International Paper Company - Springhill	722,466	754,154	(31,688)
International Paper Company - Vicksburg	224,782	215,415	9,367
Jefferson Lake Sulphur Company	157,751	157,761	(10)
Marquette Cement Company	102,713	82,171	20,542
Masonite Corporation	679,454	709,043	(29,589)
Monsanto (Chemstrand)	1,077,902	1,110,277	(32,375)
National Gypsum	103,998	103,193	805
Olinkraft, Inc.	601,387	607,915	(6,528)
St. Regis Paper Company - Monticello	328,394	315,321	13,073
St. Regis Paper Company - Pensacola	461,617	501,568	(39,951)
Scott Paper Company	596,811	560,021	36,790
Shell Oil Company	887,328	887,328	0
Southland Paper Mills, Inc.	520,270	526,056	(5,786)
Stauffer Chemical Company	215,197	215,545	(348)
Tenneco Chemical, Inc.	147,281	141,935	5,346
Texas Gulf Sulphur Company	168,728	205,110	(36,382)
TOTAL INDUSTRIALS FOR MONTH	14,784,162	14,818,037	(33,875)
AVERAGE MCF/DAY	492,805	493,935	(1,129)

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.

No. 71-1040

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., *Petitioners*

v.

LOUISIANA POWER & LIGHT COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF FOR THE ARKANSAS PUBLIC SERVICE COMMISSION

PAT MORAN,
Chairman

BENJAMIN C. McMINN,
General Counsel
Justice Building
State Capitol Grounds
Little Rock, Arkansas 72201

TREVATHAN PRINTING COMPANY, NEWPORT, ARKANSAS

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INTEREST OF THE ARKANSAS PUBLIC SERVICE COMMISSION

The Arkansas Public Service Commission (hereafter called "Arkansas" to avoid confusion with the Federal Power Commission, Petitioner) is the State Commission which is vested with the power and jurisdiction and has the duty to supervise and regulate every public utility within the State of Arkansas. This supervision and regulation is plenary and Arkansas is specifically ordered to prohibit any unreasonable preferences or rates as between locali-

ties or classes of service. Arkansas must determine the rates and charges of public utilities for public utility service, and it must determine and fix the terms and conditions of utility service. (Act 324 of the 1935 General Assembly of Arkansas, Ark. Stats. Anno. (1957 Repl.) §73-201, et. seq.). It must also approve contracts for the sale, on an interruptible basis, of utility services at agreed prices for terms not exceeding twenty-five years between utility companies and customers who use such services for manufacturing, generation, processing, preparation of products, or industrial purposes. (Act 4 of the 1965 General Assembly of Arkansas, Ark. Stats. Anno. (1957 Repl. Supp.) §73-275).

Arkansas believes that this case, in particular the issue dealing with the scope of jurisdiction of the Federal Power Commission (FPC), presents an issue which vitally affects the legitimate interests of the State of Arkansas, the utilities regulated by Arkansas, and the hundreds of thousands of customers served by those utilities. Arkansas further believes that it can and will present factual and legal matters not likely to be touched upon by the other parties hereto and it therefore files this amicus curiae brief.

SUMMARY OF ARGUMENT

A proper construction and application of the Natural Gas Act (15 U.S.C. §717) is involved in this case.

The Federal Power Commission (FPC) contends that it needs to have the power and jurisdiction to regulate curtailments of natural gas pipelines when a shortage of gas supply requires curtailment and it argues that §§ 1(b), 4(b), 5(a), 7(c) and 16 of that Act give it that jurisdiction.

We contend that §1(b) of the Act, as construed by this Court, and by lower courts, specifically deprives the FPC of jurisdiction over direct pipeline sales for consumptive use and that the FPC is therefore without jurisdiction to regulate curtailments of sales to direct, consumptive use customers.

We recognize that §7, as previously construed by the courts, gives the FPC jurisdiction to initially pass upon the application of a natural gas company for approval of a certificate authorizing such company to construct the facilities required to transport the gas involved in a direct sale but contend that this jurisdiction is exhausted when the certificate issues and does not give the FPC continuing jurisdiction over such sales.

Finally, it is our position (1) that the "need" asserted by the FPC does not actually exist and (2) even if it did exist, "need" does not supply administrative agency jurisdiction which has been withheld by the Congress.

ARGUMENT

One reading the FPC's brief is immediately and inescapably impressed by the fact that it addresses itself to the question of the "*need*" for the FPC to have the jurisdiction it claims to have rather than to the real issue which is whether or not the FPC in fact, and in law, has been granted that jurisdiction. For example, we are told: (1) at page 12 that the FPC's ability to allocate gas would be "impaired" if the lower court decision is sustained; (2) at page 13 that controversies such as the one which gave rise to this lawsuit "require" national resolution; (3) at page 18 that initial certificate approval ". . . does not obviate the *need* for (FPC) authority"; (4) again on page 18 (footnote 15) that abandonment authority does not ". . . satisfy the (FPC's) *need* for comprehensive authority over curtailments"; (5) at page 20 that only exclusive FPC jurisdiction can assure the uniformity "*necessarily demanded*", etc.; (6) at page 21 that it is "essential" that contracts remain subject to the FPC's jurisdiction; (7) at page 26 that the problem ". . . *requires* an interstate solution. . ."; and (8) at page 27 that the FPC ". . . should not be denied the *necessary* tools (to assure a fair allocation of gas supplies)". (Emphasis ours).

We submit that the FPC has begged the question which, as the Court below correctly noted (Opinion Below, Mimeo. Ed. p. 19) is:

> "Does the FPC have the authority to modify or condition a certificate of public convenience and necessity issued for facilities used to make a direct sale? Or more briefly stated: Does the Commission have continuing certificate jurisdiction?"

We submit that the questions just posed must be answered in the negative and we now address ourselves to that issue.

THE FPC HAS NO JURISDICTION OVER DIRECT INDUSTRIAL SALES OF NATURAL GAS PIPELINES

Direct sales of gas by a pipeline for consumptive use (as opposed to sales for resale) are not, and never have been, subject to the jurisdiction of the FPC.

The FPC's natural gas jurisdiction is governed by Section 1(b) (15 U.S.C. §717(b)) of the Natural Gas Act (the Act) which reads:

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but *shall not apply to any other transportation or sale* of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (Emphasis Added).

Thus, Congress specifically excluded from FPC jurisdiction sales other than sales for resale. The Act's deprivation of FPC jurisdiction over direct sales as set forth in Section 1(b) was emphasized in the landmark Supreme Court case of *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 519 (1947):

> "This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale;

and (3) natural gas companies engaged in such transportation or sale.

"The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act 'shall not apply *to any other* * * * *sale* * * *' (Emphasis added). Those words plainly mean that the Act shall not apply to any sales other than sales 'for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' *Direct sales for consumptive use of whatever sort were excluded.*

"The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, *quantities* or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed." (Footnote omitted). (Emphasis Added).

The Supreme Court's holding in *Panhandle* in 1947 is as apt today as it was then, and it has since been reaffirmed and reiterated both by the courts and by the FPC. *City of Hastings v. FPC*, 221 F.2d 31 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 920 (1955); *Colorado Interstate Gas Co. v. FPC*, 185 F.2d 357 (3d Cir. 1950); *Coastal Transmission Corporation, et al.*, 26 F.P.C. 318 (1961). Clearly, Section 1(b) is controlling in this proceeding and the lower court correctly held that the FPC lacks jurisdiction to approve curtailment policies for direct, consumptive use, customers of a gas pipeline company because such policies, of necessity, di-

rectly or indirectly affect sales to such customers over which the FPC has no jurisdiction.

Indeed, the FPC brief does not seriously question the proposition that the FPC has no direct sale jurisdiction. Instead, the FPC attempts to sustain its jurisdiction over curtailments on the theory that it has jurisdiction over "transportation" of natural gas in interstate commerce under Section 1(b) and Section 7(c) of the Act and that its "transportation" jurisdiction supplies the missing link which must be found in order to give it the curtailment jurisdiction which it has asserted. [1]/

We do not so read the Act. Unfortunately for the FPC, the courts have not so construed the Act and the legislative history of the Act and Congressional action (and *in*action) since its original passage do not support such a construction.

It must be remembered that Section 1(b) of the Act does not grant the FPC any certificate jurisdiction over direct sales. On the contrary, it says that the Act "shall not apply to any" direct sale. Therefore, if FPC jurisdiction exists, it must be bottomed on Section 7(c) certificate jurisdiction. It is recognized that the FPC has required the certification of the facilities constructed to make a non-jurisdictional direct sale under Section 7(c) and such requirement has been upheld by the courts. However, Section

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[1]/ Contrary to the FPC's position on this point is a portion of the language quoted above from the **Panhandle** case, viz:

> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, **quantities** or otherwise." (Emphasis Added).

Clearly, "quantities" have to do with curtailments but the **Panhandle** case, in the language quoted, just as clearly denies that jurisdiction with respect to direct sales.

7(c) is a *facilities* section of the Act and the facilities involved in the transaction are the facilities of the natural gas pipeline. It is not the *sale* to a direct customer that is being certificated but changes in or additions to the facilities or the operation of facilities of the interstate pipeline.

Obviously, in determining whether or not it will *initially* issue a certificate to a pipeline the FPC must consider the effect of such issuance on the public convenience and necessity. *FPC v. Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1960). However, the FPC's authority to issue an initial certificate over pipeline facilities cannot bestow upon it the right to regulate a transaction the regulation of which is beyond the power of the FPC as set forth in Section 1(b). *Pennsylvania Eastern Pipeline Co. v. Public Service Commission of Indiana*, supra, it does not give the FPC continuing authority over [illegible]. A number of cases indicate that the FPC does not have continuing jurisdiction.

In *Granite City Steel Company v. FPC*, [illegible] (1963), a case analogous to the present [illegible] that it was a Section 7(a) certificate case [illegible] sale customers of Mississippi River Fuel Corp. natural gas pipeline, sought to have its [illegible] industrial customers curtailed and its gas sold to them. The Court, reversing the FPC, found that it lacked the authority to so reallocate.

In *Colorado Interstate Gas Co. v. FPC*, [illegible] at 359, 360 (3d Cir. 1956) the Court reversed its [illegible] divided FPC requiring a pipeline to file a certificate application to all natural gas delivered to a [illegible] for resale". There, as the FPC proposes in the [illegible] was asserting continuing jurisdiction over a [illegible]

means of tariff provisions. The court would not permit it, saying:

> "The power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. What being the extent of its authority under Congress has conferred upon the Commission that body is without authority to compel Colorado Interstate to make its gas tariff applicable to any sales other than those for resale. It is beyond the power of the Commission to require a natural gas company, as a condition to making its tariff applicable to sales for resale, to make its tariff applicable to sales which are not within the jurisdiction of the Commission."

direct sale jurisdiction, Mr. Swidler stated (June 19, 1963, *Congressional Record*, p. 11084):

> "Under existing law the Commission's authority is limited to sales for resale in interstate commerce; hence, the price *and other terms* of a direct sale by a pipeline to an industrial consumer are outside the sphere of this Commission's regulatory authority." (Emphasis supplied)

The proposed amendments were never adopted by the Congress and it follows that if the FPC then (by its own admission) lacked jurisdiction over the "price *and other terms*" of direct sales of natural gas it still lacks that jurisdiction today. Further, without unduly belaboring the point, we would emphasize that regulation of curtailments, i.e., the volumes of gas delivered and when those volumes are delivered, most certainly constitutes the regulation of "other terms" of a direct sale and as Chairman Swidler correctly observed in 1963 ". . . are outside the sphere of (the FPC's) regulatory authority."

The *Transco* case (*FPC v. Transcontinental Gas Corp., supra*) furnishes a good example of historical recognition by the FPC of its lack of continuing jurisdiction over a direct sale once a certificate has issued. Briefly, Consolidated Edison Co. (Con. Ed.), an electric utility, had arranged for the purchase of quantities of gas directly from producers which gas it wished Transco to transport.[2]/ Transco was

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[2]/ Significantly, this Court concisely set forth the "no direct sale jurisdiction" rule as follows:

> "This transaction is commonly labeled a 'direct' sale **and, because it does not entail a sale for resale in interstate commerce, is not subject to the Commission's jurisdiction** except insofar as Section 7 requires the Commission to certificate the transportation of gas pursuant to the sale." 365 U.S. 1 at 4. (Emphasis Added).

compelled to seek a transportation certificate from the FPC which the FPC denied. This Court's opinion noted (365 U.S. at page 5) that the FPC staff "vigorously" opposed the grant of certificate and gave as one reason for opposition that ". . . authorization of this and similar direct sales to major industrial users would result in pre-emption of pipeline capacity and gas reserves to the detriment of domestic consumers competing for gas supply. . .". The point we are making is that the FPC tacitly admitted by making this argument that it had no continuing jurisdiction over even the "transportation" once the certificate had been granted. Otherwise, there would have been no need for concern about the possibility that at some time in the future the direct sale gas would over load the capacity of the pipelines because *if* the FPC had the continuing jurisdiction it now asserts it has it could simply deal with that situation when it arose. However, it obviously (and correctly) thought its jurisdiction had been exhausted when it granted the certificate.

The FPC's argument that it "needs" curtailment jurisdiction is partially based on its asserted fear that some sort of regulatory gap might be created if it were not granted the jurisdiction it seeks. It couples this argument with gloomy predictions of the chaos that might result if "uniform" regulation at the "national level" is not established. This is just another way of stating its basic premise that "the FPC *needs* full regulatory power because it, and it alone, can do the job." (See, e.g.: FPC Brief pp. 13, 18, 20 and 26). If the FPC argument were carried to its logical conclusion, *nothing* would be left for state regulation even though we have shown (and will show) that the right of the states to regulate many aspects of the sale and transportation of natural gas has always been recognized by

Congress and the Courts and even admitted by the FPC itself.

A brief look at the legislative history of the Act might prove instructive. One of the first cases involving the Act to reach this Court after its passage in 1938 was *Illinois Natural Gas Company v. Central Illinois Public Service Company*, 314 U.S. 498 (1941). In that case this Court quoted from the House Committee Report on the bill which became the Act as follows:

> "The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. *The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation.* (Cite omitted). *There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction.*" 314 U.S. 498 at 506. (Emphasis Added).

We have already pointed out that the FPC sought, in 1963, to broaden its powers to give it direct sale jurisdiction and thereby ". . . disturb the States in their exercise of such jurisdiction. . ." but was unsuccessful in its attempt. Thus, thirty-four years ago when it passed the Act, Congress initially recognized the right of state regulation and as recently as 1963 refused to disturb that right.

While not doubting the sincerity of the FPC's argument that chaos would result absent national regulation of curtailments, we view this argument as a strawman and do not share the FPC's concern because we do not believe that the disastrous consequences it predicts (absent central regulation) will actually occur. The best evidence to

refute the FPC's contention is found in the matter of rate regulation. The FPC admits that it has no *rate* jurisdiction over direct sales of natural gas. See: FPC Brief, pp. 13-14 and 22.[3]/ Thus, by the FPC's own admission, the fifty states are free to go their own separate ways in the matter of direct sale rate regulation — and have done so. It is difficult to imagine a more important term or condition of a sale than the price at which that sale is made yet the several states are free to, and do, regulate direct gas sale prices and the Republic has survived despite the lack of uniformity at the national level on that score.

Further, the "gap" in regulation that the FPC assertedly fears, need not exist. It certainly does not and will not exist in the State of Arkansas. On August 9, 1971, in Docket U-2307, following extended hearings comprising a transcript of well over four thousand pages, Arkansas withdrew its prior approval of approximately fifty gas sales contracts entered into between Arkansas Louisiana Gas Company (the largest natural gas company doing business in Arkansas) and numerous of its large industrial customers. The Order dealt with the matter of such direct sale contracts in considerable detail, contained an extended discussion of the issues before Arkansas, made exhaustive findings of fact and set forth detailed and specific orders

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[3]/ That concession alone should be sufficient to dispel any lingering doubt about the FPC's jurisdiction. This is so because the "rate" paid by a direct sale customer is not limited solely to the price per Mcf which it pays for gas. The volumes which the customer can count on receiving are an intrinsic part of the factors which a customer considers in agreeing upon a price for the service. An unagreed upon reduction in those volumes means that that the value of the service has decreased. In other words, the customer is paying the same amount of money but getting a poorer quality of service in exchange. It is axiomatic that a constant payment for reduced value is the equivalent of a higher payment for a constant value and is, in effect, a rate increase over which, as noted, the FPC admittedly has no jurisdiction.

(covering, among other things, *curtailment priorities* in the event of shortage of gas supply) with respect to the contracts. In its order, Arkansas made it clear that further proceedings affecting such contracts would be instituted by it and such proceedings are now, in fact, under way. Under the heading "Interest of the Arkansas Public Service Commission", *supra*, we described Arkansas' jurisdiction. The Order referred to above is far too lengthy to quote or even to discuss in more detail but we have had it printed and attached as Appendix A to this brief as proof positive that Arkansas not only has "paper" jurisdiction but has asserted that jurisdiction and has and is vigorously exercising its asserted jurisdiction.

We have gone to considerable length in demonstrating the FPC's total lack of continuing jurisdiction over direct sales of gas for consumptive use in order to dispose of its argument that curtailment authority (over such sales) is found in Sections 4, 5 and 16 of the Act. (15 U.S.C. 717c, 717d and 717o, respectively). (FPC Brief pp. 26, et. seq.). The FPC points specifically to sections 4(b) and 5(a), which deal with undue preferences and discrimination, as being sources of jurisdiction. However, the FPC was good enough to include quotations from those sections in its brief (§ 4(b) at page 27 and § 5(a) at page 28). Careful reading of those quotations will reveal to the Court that, far from being a *grant* of jurisdiction, each of those sections carries forward the limitations on FPC jurisdiction discussed hereinabove since each section contains the limiting phrase ". . . any transportation or sale of natural gas *subject to the jurisdiction of the* (FPC) . . ." (Emphasis ours). We have shown that the FPC has no jurisdiction over direct sales for consumptive use and the two sections last referred to thus add nothing to the FPC's authority.

It borders on the facetious to argue that § 16 is a source of curtailment jurisdiction. That section is merely a catch-all giving the FPC the necessary incidental powers ". . . to carry out the provisions of this Act." Matters specifically excluded from coverage of the Act, such as direct sales, cannot be slipped back in by general language such as that quoted.

In short, as we pointed out at the outset of this brief, the FPC's principal argument is that it "needs" this jurisdiction and *must* therefore have it whether or not the Congress has given it that authority. Statutes cannot be so loosely construed and power withheld by Congress cannot be so easily usurped by agency fiat. On this subject, this Court said, in *F.T.C. v. Raladam Company*, 283 U.S. 643 at 649 that:

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. *If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers;* nor can they be created by the courts in the proper exercise of their judicial functions." (Emphasis Added).

Finally, we could not choose better words to lay to rest the "need" argument than those of the lower court where it said (Opinion Below, Mimeo. Ed. p. 19):

> "FPC asserts. . . that it *'needs'* to have this jurisdiction to make effective what it conceives to be the full extent of its regulatory powers. We deny this assertion. Even conceding that FPC powers are as broad as it asserts, no amount of need alone can create federal agency power if Congress has not expressly or impliedly granted it. Necessity may be the mother of

invention, but need must have the paternal spouse — a legislative grant — to beget agency authority."

In other words, if FPC is unhappy with its statutory jurisdiction and feels that it "needs" more and broader jurisdiction, it should (as it unsuccessfully did in 1963) go to Congress and seek to have its statutory power enlarged. Unless and until it does so, it should not be allowed to exercise power it does not have merely because it divines a need for that power.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals was correct on the issue of jurisdiction of the FPC and that Court's judgment, on that issue, should therefore be affirmed.

Respectfully submitted,

PAT MORAN,
Chairman

BENJAMIN C. MCMINN,
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Justice Building
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April, 1972.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.

No. 71-1040.

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., *Petitioners*

v.

LOUISIANA POWER & LIGHT COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF FOR THE ARKANSAS PUBLIC SERVICE COMMISSION

APPENDIX

ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF INDUSTRIAL)		
CONTRACTS OF ARKANSAS	)	DOCKET NO.
LOUISIANA GAS COMPANY	)	U-2307

OPINION AND ORDER

A. *PROCEDURAL HISTORY*

This proceeding commenced December 11, 1970, when the Arkansas Public Service Commission (The Commis-

sion) issued a Show Cause Order to Arkansas Louisiana Gas Company (Arkla) and to each large industrial gas customer served by Arkla under sales contracts individually negotiated between Arkla and each industry and submitted to the Commission for approval. The Commission, with a few exceptions, had approved these sales contracts, as reflected by an Order issued after a hearing on each application.

The Show Cause Order directed Arkla and each Industrial Respondent to appear before the Commission for public hearing to show cause why the Commission should not set aside its Orders approving each of the negotiated sales contracts. Arkla was required in the same proceeding to show cause why it should not be ordered to file General Industrial Tariffs with the Commission, under which all industrial customers could receive natural gas service.

The recitation in the Commission's Show Cause Order of those conditions requiring it to commence the proceeding included:

1. The increasing curtailments of natural gas experienced by the large industrial customers and the prospects that such curtailments would grow in the immediate future;
2. The threat that the imbalance between gas demand and supply would result in a rapid depletion of gas reserves which might threaten the gas supply available for human needs; and,
3. The absence of a coherent and equitable curtailment policy on file with the Commission.

The Commission observed that these matters were of great moment to Arkansas and noted that a reasonably forseeable

future increase in Arkla's gas costs made it incumbent to decide whether such increased costs could be ratably distributed to all classes of gas customers. The Commission also noted the National concern over gas supplies and those calls by the Executive Branch of the United States Government for state and federal regulatory agencies with jurisdiction and responsibility in public energy distribution systems to commence dealing with energy shortage problems.

Arkla's Response to the Show Cause Order revealed its position to be that no cause could be demonstrated why the Commission's Orders approving negotiated contracts should not be rescinded. Arkla further alleged that some provisions of certain large volume industrial gas sales contracts were injurious to its ability to acquire additional gas reserves and that these provisions made it impossible to establish reasonable curtailment priorities among large industrial customers. Responses by the industrial buyers were generally consistent in questioning the Commission's jurisdiction to amend or rescind its prior Orders of approval, and that the Commission's established procedure of private negotiation, submission of the resulting contract to the Commission, and Commission approval of same after hearing, was satisfactory. The industrial buyers also asserted that the composite and individual results of the procedure were desirable and in the public interest, and produced either no injury to Arkla or were insufficiently injurious to Arkla to create a serious danger to gas utility service needs of the people of Arkansas.

Arkla served its testimony and exhibits on the Commission and the respondent industries. The direct testimony of Arkla's witnesses, together with clarifying questions and responses during the hearings totaled 223 pages

of transcript. The responding large industrial customers requested additional time to file testimony and exhibits and to prepare for cross-examination of Arkla's witnesses. The Commission granted this additional time in the interest of procedural fairness, in that Arkla's direct evidence was uniquely at its disposal, since Arkla had familiarized itself with much of the relevant evidence in preparation for recent proceedings before the Federal Power Commission and also because many of the respondent large industrial customers could not fairly be expected to speedily prepare evidence for a hearing by a regulatory tribunal before which they had not heretofore appeared.

Cross-examination of Arkla's witnesses commenced on February 15, 1971, and, with short recesses, concluded on March 18, 1971. This exhaustive cross-examination by 10 of the responding large industrial buyers and the Commission's staff, together with questions from the bench by members of the Commission comprise approximately 2523 pages in the hearing transcript. Direct evidence was served on April 1, 1971, by some large industrial buyers which comprise approximately 250 pages with the entire transcript totaling 4359 pages. Arkla and the Commission staff cross-examined the industrial witnesses from April 29th, to May 5th, 1971, at which time the longest proceeding in the history of the Arkansas Public Service Commission concluded. Including the briefs simultaneously filed on June 18, 1971, by those parties electing to do so, the supplemental information required of various parties during the course of the proceedings, and the Commission records of earlier relevant cases which were incorporated by reference, the Commission had before it approximately 10,000 pages of material pertaining to the case.

B. THE CURRENT STATUS OF ARKLA'S GAS SUPPLY

1. The supply of natural gas available to Arkla is inadequate to take care of the requirements of its existing customers. The record shows that the volumes of gas which Arkla can obtain from its various production sources, purchases from gas producers and pipeline companies is insufficient to meet the normal peak demands of its customers and their annual requirements necessitating curtailments far in excess of those experienced during cold weather periods in prior years. For its Ark-La-Tex integrated system, Arkla's peak day deficiency is estimated to reach 808,500 Mcf in the 1971/1972 and 849,600 Mcf in the 1972/1973 winter heating seasons. The estimated annual deficiency of supply amounts to 50,615,000 Mcf for 1971, 114,594,000 Mcf for 1972 and 162,450,000 Mcf for 1973. These annual deficiencies represent 10.39%, 23.02%, and 32.16% respectively of the total requirements and 14.39%, 31.71% and 44.18% respectively of the requirements of Arkla's main line industrial customers.

No convincing challenge has been made by any party to these proceedings to the evidence submitted by Arkla demonstrating that its existing gas supply is critically short and incapable of supplying the requirements of the residential, commercial and other human needs customers in the future without making drastic curtailments in the deliveries of gas to its industrial customers.

The shortage of gas supply is not unique to Arkla. It is of national proportion, and is of such magnitude and involves such dire consequences as to have generated remedial action at both the federal and state levels. As the Commission pointed out in its Order of December 11, 1970, the dimensions of the present scarcity of natural gas was

not forecast until some two years ago. The evidence shows that Arkla's officials, while aware of the possibility of an impending shortage, did not recognize its depth and serious consequences until sometime in 1970. Moreover, during that intervening period of time, the Company aggravated the situation by attaching additional industrial customers to its system having total daily requirements of 31,160 Mcf. On March 11, 1971, Arkla advised the Commission of its intention not to serve new industrial customers either under contract or presently filed tariffs.

Arkla, in May, 1970, filed an application with the Federal Power Commission for a certificate to construct and operate a large diameter natural gas pipeline into the Deep Anadarko Basin of Oklahoma and the Texas Panhandle to secure additional gas reserves for customer requirements. Arkla received a favorable decision from the Presiding Examiner on June 29, 1971, with respect to the first phase of the project. The Examiner's decision is now pending before the full Federal Power Commission.[1] The Arkansas Commission, along with the regulatory commissions of other states served by Arkla, has supported this endeavor of Arkla to augment its gas supply. A favorable decision by the Federal Power Commission in the near future is hoped for by Arkla, this Commission, and Arkla's customers. However, even assuming near term approval, it is doubtful that the Anadarko gas will be available until the 1972/1973 heating season.

In the meantime, Arkla intends to attach such additional gas reserves in its existing supply areas as can be secured. Arkla is in the process of developing the Ruston storage field which will provide an additional source of gas to meet its winter peak demands. It is also requesting the

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[1] FPC Docket No. CP70-276

Federal Power Commission to grant it relief from its contractual commitments to supply gas to two interstate pipeline companies at times when gas is needed to supply the human needs requirements of its Arkansas customers.[2]

Despite the possible success of these several efforts to improve the deliverability of the Arkla system so that it can supply the anticipated requirements of its customers, the magnitude of such possible improvements in gas supply will be insufficient to avoid massive curtailments during the coming winter heating season. It is with the difficult problem inherent in curtailment priorities that the Commission must take action in order to protect the interests of Arkansas citizens who depend on a supply of gas for space heating, cooking, water heating, and other human needs requirements.

COMMISSION JURISDICTION TO RESCIND OR AMEND PRIOR ORDERS:

2. By action of the Arkansas Legislature, the Public Service Commission was entrusted with the power and jurisdiction to regulate and supervise public utilities serving the people of Arkansas, and ". . .to do all things. . .that may be necessary or expedient in the exercise of such power and jurisdiction."[3] Specific authority, subject only to procedural fairness, was given the Commission to ". . .at any time, and from time to time, . . . rescind or amend any decision made by it."[4] The jurisdiction of the Commission to amend or rescind any prior order approving industrial gas

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[2] FPC Docket No. RP71-122

[3] Ark. Stat. Ann. 73-202

[4] Ark. Stat. Ann. 73-230

contracts was strongly challenged during the course of the hearing in this case and extensively argued in briefs. A number of large industrial customers argued that Act 4 of 1965[5] (hereinafter "Act 4") repealed, by implication, the Commission's power to review its Orders and Findings insofar as this particular class of utility consumers is concerned. Act 4, in its entirety, reads as follows:

> "Public utilities are authorized to contract for sale, on an interruptible basis, of utility services at agreed prices for a definite term not to exceed twenty-five (25) years with customers whose use of such service is for manufacturing, generation, processing, preparation of products, or industrial purposes; provided that such contracts shall be subject to approval by the public Service Commission before becoming effective. Such contracts, after approval by the Commission, shall continue in full force and effect for the term thereof."

For the reasons set out in the following discussion and on the basis of its findings in this proceeding, the Commission rejects the argument that the Legislature intended to create a preferential class of utility consumer who would be insulated from regulatory scrutiny for as much as a twenty-five year period. Accordingly, the Commission hereby asserts its statutory power to amend or rescind its prior approval of long term industrial contracts upon a showing that the public interest so demands.

It should be noted at the outset that Act 4 cannot be regarded as applicable to all Commission Orders reviewed in this proceeding. Those contracts entered into and approved

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[5] Ark. Stat. Ann. 73-275 (1969 Supp.)

prior to the effective date of Act 4[6] cannot be deemed subject to its alleged preferential effect. If the Commission adopted the argument of the large industrial customers that once Commission action occurred, such agreements were sacrosanct for their entire term (which, as indicated, could be up to 25 years), then the Legislature manifestly could not have intended to retroactively insulate contracts approved prior to Act 4, when the Commission was unaware of the long-term implication of its Orders. Another category of large industrial customers are those customers who have renegotiated contracts since Commission ap-

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[6] Act 4, with its Emergency Clause, became effective January 25, 1965, with the signature of the Governor. Orders approving contracts prior to this date are:

CUSTOMER	DOCKET NO.
Arkansas Chemicals, Inc.	U-1673
Arkansas Elec. Co-op Corp.	
Augusta	U-1819
Arkansas Elec. Co-op Corp.	
Ozark	U-1583
Arkansas Power & Light Co.	
H. Spgs., NLR, Stamps,	U-1443
Helena	U-1383
Columbian Carbon	U-1476
Continental Oil Company	U-1850
Monsanto Company	U-1444
United States of America	
Pine Bluff Arsenal	U-1282

proval.[1] Such renegotiated contracts are not the same contracts approved earlier by the Commission, and, insofar as the Commission is concerned, such contracts in their renegotiated form are again subject to Commission scrutiny. Consequently, the following discussion of Act 4 relates essentially to those contracts negotiated and approved after the effectiveness of Act 4, which have not subsequently

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[1] Renegotiations have apparently taken place on contracts initially approved in the following Dockets:

NAME OF COMPANY	DOCKET NO.	DATE OF AMENDMENT
Aluminum Co. of America	U-1945	July 30, 1970
Ark. Elec. Co-op Corp. Camden	U-2070	June 9, 1970
Ark. Elec. Co-op Corp. Ozark	U-2071	June 9, 1970
Ark. Elec. Co-op Corp. Augusta	U-2072	June 9, 1970
Arkla Chemical Corp. Helena	U-1891	October 16, 1970
Arkla Chemical Corp. Gurdon	U-1987	November 3, 1970
Ark. Cement Corp.	U-1477	October 26, 1970
Ark. Chemicals, Inc.	U-1673	January 26, 1970
Benton Light Imp. Dist. 1	U-1985	December 16, 1969
Great Lakes Chem. Corp.	U-1955	January 19, 1970
Malvern Brick & Tile Co.	U-1948	January 23, 1970
Minn. Mining & Mfg. Co.	U-1949	February 12, 1970
Nekoosa-Edwards Paper Co.	U-2036	May 20, 1970

been renegotiated," i.e., does this Commission have the jurisdiction to withdraw its prior approval of such contracts?

THE POLICE POWER OF THE STATE

It is no longer open to question, in the face of the consideration given the issue by numerous courts, that a contract between a public utility and a consumer is subject to the police power of the State, and must fall where the public interest so demands.[8] The United States Supreme Court has long since ruled that a State may exercise its police power to regulate public utilities and fix rates, notwithstanding that the effect may be to modify or abrogate pri-

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FOOTNOTE 8
These contracts were approved by Orders issued in the following Dockets:

CUSTOMER	Contract Date	APSC Docket	Date PSC Order
After January 25, 1965			
Acme Brick Company	1-26-66	U-1961	3-20-66
Aluminum Co. of America	12-30-65	U-1945	2-[illegible]-66
American Oil Company	2-28-66	U-2009	7-[illegible]-66
Ark. Electric Coop. Corp. Camden	6- 1-67	U-2070	7-18-67
Ark. Electric Coop. Corp. Augusta	6- 1-67	U-2072	7-18-67
Ark. Electric Coop. Corp. Ozark	6- 1-67	U-2071	7-18-67
Arkansas Kraft Corp.	9-27-65	U-1967	3-22-66
Ark. Lightweight Aggreg. Corp.	1-21-66	U-1960	3-22-66
Arkansas Power & Light Co. Helena	5-13-65	U-1892	5-19-65
Arkansas Power & Light Co. Hot Springs	10-13-66	U-2025	11-20-66
Arkansas Power & Light Co. Helena	4-20-70	U-2272	9- 4-70
Arkansas Power & Light Co. Mabelvale	4-20-70	U-2271	9- 4-70

(FOOTNOTE 8 continued)

Arkla Chemical Corp.			
Gurdon	4- 6-66	U-1987	5-24-66
Arkla Chemical Corp.			
Helena		U-1891	5-19-65
Baroid Division, Nat'l. Lead Co.	12-29-65	U-1950	2- 3-66
Benton Light Impr. Dist. No. 1	3-15-66	U-1985	5-24-66
Berry Petroleum Company			
Stephens	12-29-65	U-1952	2- 3-66
Berry Petroleum Company			
Waterloo	12-29-65	U-1951	2- 3-66
Bromet Company	1-27-69	U-2192	6- 9-69
The Celotex Corporation	3-18-66	U-1986	5-24-66
Conway Light, Power & Water	9-23-66	U-2032	12-29-66
Cross Oil & Ref. Co. of Ark.	12-30-65	U-1953	2- 3-66
Dierks Div., Weyerhaeuser Co.			
Pine Bluff & Perkins	3- 4-66	U-1983	5-24-66
Dierks Div., Weyerhaeuser Co.			
Dierks	7-10-69	U-2223	12- 5-69
Great Lakes Chemical Corp.	1-12-66	U-1955	3-22-66
A.P. Green Refractories Co.	12- 9-65	U-1963	3-22-66
Ideal Cement Company	12-15-69	U-2269	9- 4-70
International Paper Company			
Pine Bluff, Camden, Malvern	1- 1-66	U-1962	5-24-66
MacMillan Ring-Free Oil Co.	12-10-65	U-1947	2- 3-66
Magnet Cove Barium (Dresser			
Magcobar, Div. of Dresser, Inc.)	1-11-66	U-1954	2- 3-66
Malvern Brick & Tile Co.	12-15-65	U-1948	2- 3-66
Minnesota Mining & Mfg. Co.	12-28-65	U-1949	2- 3-66
Monsanto Company	12-16-66	U-2038	12-29-66
Nekoosa Edwards Paper Co.	12- 7-66	U-2036	12-29-66
Olinkraft, Inc.	6-25-69	U-2221	12- 5-69
Humble Oil & Refining Co.			
Phillips Petroleum Co.	11- 1-65	U-1966	5-24-66
Remington Arms Co., Inc.	6- 4-69	U-2222	12- 5-69
Reynolds Metals Co.			
Bauxite, Lake Catherine & H.S.	1- 1-66	U-1965	5-24-66
Reynolds Metals Co.			
Arkadelphia	1- 1-66	U-1964	5-24-66
Union Carbide Corp.	12- 7-66	U-2037	12-29-66

vate contracts.[9] The Arkansas Supreme Court has characterized the power to regulate rates of public utilities as:

> ". . .an inherent attribute of police power or sovereignty existing in the State, which may be exercised at any time through any state agency for the purpose of establishing just, equitable and reasonable rates under such circumstances as may exist at the time. It is . . . an attribute of sovereignty . . . in contemplation of which all contracts and agreements must be made."[10]

THE COMMISSION'S OBLIGATION TO INTERPRET ITS LEGISLATION AS CONSTITUTIONAL AND REASONABLE

It is inevitable that where legislation could be construed, as some large industrial customers have so construed Act 4, as yielding up a fundamental attribute of governmental sovereignty, the question of the constitutionality of the legislation arises. This Commission has not had past occasion to take a position on whether it should make a determination of the constitutionality of legislative enactments dealing with its duties. It is, however, the opinion of the Commission that it lacks both the power and the special competence to rule on the constitutionality of legislation and regards any effort to do so by an agency which is a creature of the legislature as a violation of the institutional proprieties of the relationship.[11]

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[9] **Producers Transp. Co. v. Railroad Commissions,** 251 US 228; **Union Dry Goods Co. v. Georgia Public Serv. Corp.,** 248 US 372; **Pipe Line Cases,** 234 US 548; **Louisville & N.R. Co. v. Mottley,** 219 US 467; **Munn v. Illinois,** 94 US 11.

[10] **Camden v. Arkansas Power & Light Co.,** 145 Ark. 205; **Clear Creek Oil & Gas Co. v. Fort Smith Smelter Co.,** 148 Ark. 260.

[11] DAVIS, ADMINISTRATIVE LAW TREATISE, Vol. 1, Sec. 20.04

However, two fundamental and interrelated principles of interpretation of legislation are here concerned. One, the "Golden Rule of Statutory Interpretation"[12] is that where alternative constructions of a statute are possible, the reasonable interpretation must prevail over the unreasonable and the constitutional alternative over the unconstitutional. The other principle is that an administrative agency has a duty to construe and determine the applicability of a statute so as to avoid attacks on both its reasonableness and its constitutionality.[13] Applied to the Commission's interpretation of Act 4, these principles compel it to determine the most reasonable and least constitutionality vulnerable application. The interpretation pressed by the large industrial customers is neither the most reasonable nor the most constitutionally acceptable, and is rejected. To construe Act 4 as repealing, by implication, the Commission's powers to review its Orders would require the Commission to defend, as "reasonable", a construction which places some 70% of the sales of Arkla beyond the continuing review essential to effective regulation. [13] The Commission finds that the General Assembly did not surrender its police power to regulate public utilities, nor curtail the Commission's jurisdiction for any length of time or any term of years, by the enactment of Act 4 of 1965.

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[12] DAVIS, ante.

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[13] For the Commission to presume the Legislature intended to confer upon this class of utility consumers special rights might place Act 4 in conflict with specific provisions of the Arkansas Constitution. ARK. CONST., Art. 17 established limitations on the General Assembly with respect to its enactments relating to railroads, canals, and turnpikes, the "public utilities" of the day. However, Sec. 9 of that article, prohibiting the Legislature from abridging the State's right of eminent domain, was assumed by the Arkansas Supreme Court to be applicable where the utility in question was a water company. **City of Helena v. Ark. Utilities Co.**, 208 Ark. 443, 186 S.W.

(FOOTNOTE 13 continued)

2d 783 (1945). Article 17, Section 10 (as amended by Amend. 2), directed the General Assembly to ". . . pass laws to correct abuses and prevent unjust discrimination and excessive charges . . ." of railroads, canals, and turnpike companies, and to create ". . . such authority as shall be necessary to carry into effect the powers hereby conferred."

Early Arkansas regulatory commissions were duly established — See Generally THE GROWTH OF UTILITY REGULATIONS IN ARKANSAS: A FUNCTIONAL SURVEY, 21 Ark. L. Rev. 539 (1968); and in **Helena Water Co. v. Helena**, 140 Ark. 597, 216 SW 26 (1919), an Act which expanded the power of the Arkansas Corporation Commission to regulate water, gas, street car, and telephone companies, was upheld as authorized under Sec. 10, and the new Commission was to apply the same power to correct abuses. A subsequent restructuring of utility regulatory agencies, which specified that the Commission should be empowered to regulate all public service corporations, companies, and utilities was deemed in **Southeast Arkansas Freight Lines, Inc. v. Arkansas Corporation Commission**, 204 Ark. 1023, 166 SW2d 262 (1942), as legislative response to the "constitutional mandate" of Art. 17, Sec. 10 (as amended by Amend. 2).

The principle established by these cases is that of judicial recognition that the 1898 constitutional language, which listed those public utilities of the moment, established a constitutional policy applicable to public utilities as they became identified as such, and that ". . . the rule of exclusion of those things not expressed does not apply." **Helena Water Company, supra**, at 605.

For this Commission to construe Act 4 as an effort by the General Assembly to withdraw from this administrative agency and future legislatures the power to correct abuses and discrimination would be improperly assuming a legislative intent squarely contrary to Arkansas constitutional policy.

THE REASONABLE AND CONSTITUTIONAL PURPOSE OF ACT 4

The judicial and legislative background against which Act 4 must be viewed demonstrates that the Arkansas General Assembly intended a measure which would act intersticially to clarify a matter of interest to industries and gas companies alike.

Early opinions by the Arkansas Supreme Court raised serious questions as to the extent either party to a contract between an industry and a public utility was bound by the contractual provisions. In *Harrison Electric Company v. Citizens Ice & Storage Co.*, 149 Ark. 502, 232 SW 932 (1921), an industrial utility customer had executed a contract with a public utility with a specific rate. The utility subsequently and unilaterally filed a schedule with the Commission which increased this rate, giving no notice of the change to the customer. The Arkansas Court held that filing with the Commission constituted adequate notice, and that since the statute had been satisfied, the new rates superseded any contractual rates theretofore established between the parties. The Court held, at p. 507, that "There could be no valid contract as against the power of public control of the Commission."

Other Arkansas cases, with strong observations on the limitations on the power of public utilities to make contracts have left further doubt on whether such contracts were worth anything.[14]

The issue came to national attention in *United States Gas Pipe Line Co. v. Mobile Gas Corporation*, 350 US 331

[14] See, e.g., Clear Oil & Gas Co. v. Fort Smith Smelter Co., 148 Ark. 260, where the Court held that contracts executed while the Seller even contemplated becoming a public utility ". . . constituted, in effect, an invasion of the public right . . .".

(1956) and *Federal Power Commission v. Sierra P. P. Co.*, 350 US 348 (1956).

In Mobile, the question was whether, under the Natural Gas Act, a regulated natural gas company furnishing gas under a long-term contract, could change the rate by filing a new rate schedule, against the protests of the purchaser.

The provisions of the Natural Gas Act, at issue in the Mobile Case, *supra*, were somewhat similar to the Arkansas laws dealt with by the Arkansas Court in the Harrison Case, *supra*. The United States Supreme Court, however, reached a somewhat different result. It held that the filing provisions in the Natural Gas Act did not confer new powers on gas companies which enabled them to unilaterally change contracts. The Court found that no impairment of the regulatory power of the Commission was effected. By preserving the integrity of contract to this extent the Natural Gas Act, as construed, reached the objectives set out in the Emergency Clause of Act 4; i.e., to permit the stability of supply arrangements and to allow industrial users to make substantial investments they would be unwilling to make without long-term commitments from the Seller. The Court observed that such commitments could not be made if the contracts were subject to unilateral change by the natural gas company whenever its interest so dictated.

However, the Court made it plain that denying to gas companies the power to unilaterally change contracts "in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest."

The relief avenue for gas companies was held to be

through the Federal Power Commission. The gas companies could initiate proceedings to obtain relief from their own contracts and furnish any relevant information showing the contract rates are so low as to be in conflict with the public interest.

The parallel between the Mobile Case and the Arkansas practice is a reasonable explanation of why the Legislature deemed Act 4 to be the method by which Arkansas cases such as Harrison, *supra,* could be clarified, and industries given protection. Prior to Act 4, long-term contracts were of questionable value to the parties entering into the contract, and a gas company conceivably could unilaterally change its contract rates. After Act 4, if the Commission approved a contract, it became binding and enforceable as between the parties. As the United States Supreme Court noted in the Mobile Case, *supra,* adequate certainty was given industry to enable it to make large investments by this protection, and it was neither necessary, reasonable, nor intended, that regulatory agencies be bound by such contracts.

C. THE SHORTCOMINGS OF NEGOTIATED CONTRACT RATE MAKING

There are presently 48 separately negotiated industrial contracts on file with this Commission. The price, escalation clauses and other provisions in these contracts vary widely regardless of the fact that the service rendered is essentially the same. The prices set forth in the contracts vary from .2675c per Mcf to .4025c per Mcf. Neither the volume delivered, the end use of the gas purchased, nor the interruptibility of deliveries explain these price variances. Moreover, large contributions in aid of construction were exacted from some industrial customers before they could

obtain service from Arkla, "as a matter of policy," and without a showing of the economic feasibility of the project.[1] "Negotiation," in the context of utility services, apparently is a process whereby customers may be treated differently where no rational basis for such distinction is apparent.

The Commission's overriding obligation to the public is such that it can no longer assume that because Arkla and its industrial contract customers were at one time satisfied with the results of their negotiations, that the public interest is presently served by these contracts. The contracts, in the main, were negotiated and approved when there was no thought by Seller, Buyer, or the Commission, that the apparent abundant supply of gas would not continue into the indefinite future. Decisions of Arkla's management, its industrial customers, and this Commission were premised on near-term facts as they then appeared and an assumption of a never diminishing supply of natural gas. This assumption is now conclusively proved to be erroneous.

Under the aegis of negotiated contracts there is no forum or procedure for the Commission or the Commission Staff to look at the entire picture and to take action when necessary to protect the interest of other customers of the utility from adverse consequences which may be brought about by the negotiated contract terms under changing conditions and circumstances.

For the Commission to stand idly by and allow the agreements between Arkla and its customers to dictate the extent to which the diminishing available supply of natural gas for which there is no economic and practical alternatives, will be made available to the people of the State of Arkansas and the manner of its distribution would, in our

[1] An example is the OlinKraft Contract dated June 25, 1969, and approved by the Commission in Docket No. U-2221.

judgment, be an abdication of the Commission's responsibility which would lead to disaster. The obligation and responsibility of this Commission under the Arkansas Statutes forbids such inaction on our part.

D. ARKLA'S PROPOSAL TO ADOPT A TARIFF IN LIEU OF INDIVIDUAL INDUSTRIAL CONTRACTS

Arkla filed a proposed tariff (Exhibit 13) applicable to Large Industrial Customers designated as "P.S.C. Schedule Number 4" and consisting of Original Sheets 1-15 inclusive. P.S.C. Schedule Number 4 provided for (a) Statement of Availability, (b) List of Customers, and (c) Form of Service Agreement. It also included the following:

RATE: "The unit price per Mcf for gas delivered hereunder shall, as to each purchaser, be the unit price per Mcf specified in that customer's superseded contract previously in effect, complete with all price adjustments applicable under the contract, except that there shall be no price adjustment, penalty or payment of whatever kind for any curtailments of interruptions in the supply of gas."

Arkla's proposed P.S.C. Schedule Number 4, as Arkla's case was presented, would supersede the industrial contracts in their entirety in the event the Commission "set aside" its prior approvals of said contracts, save for the foregoing "rate" clause, which preserves existing unit prices and omits penalty provisions. Specifics of gas delivery for each customer would be set out in the Service Agreement.

When the Commission held in an earlier case[1] that a

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[1] Docket No. U-2297, **In the Matter of the Application of Arkansas Louisiana Gas Company for the Curtailment of the Supply of Gas to its Industrial Customers.**

curtailment priority list proposed by Arkla was discriminatory on its face and that the prices in the contracts negotiated between Arkla and its industrial customers did not provide any necessary relationships between curtailment priorities and prices to be paid for gas, it recognized that at some time prices and supply priorities must be related. The instant proceeding fell short of accomplishing this goal. However, the record is complete as to provisions in three of its existing industrial contracts which Arkla contends would represent a substantial financial burden in view of future anticipated curtailments of deliveries under such contracts.[2]

Arkla's proposed tariff to increase the minimum bills of its industrial customers above the levels provided in the individual industrial contracts. In addition, Arkla proposed to effect a uniform adjustment for the heat content of the gas it delivers which represents a deviation from the existing heat content provisions of most industrial contracts.

Based on consideration of the evidence, the Commission concludes that justification has not been shown on this record for increasing the minimum bills of industrial customers to the level proposed by Arkla, nor does the evidence support any change in the minimum bill level. While a uniform heat content adjustment provision is desirable, it is deemed that because of the relationship between this proposed adjustment and the prices per Mcf set forth in the contracts to which it is applicable, no sound basis exists in this record for Commission acceptance thereof.

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[2] The purported rate adjustment provision in the Continental Oil Company Contract was not filed with or approved by the Commission, thus only two existing contracts with Arkansas Power & Light Company contain a rate provision requiring payments to Arkla in the event of curtailments exceeding 3 percent on an annual basis.

The evidence submitted by Arkla as to the potential effect of the price adjustment clause due to curtailment of deliveries of gas to Arkansas Power & Light Company at that company's Helena No. 2 and Lake Catherine No. 4 steam electric plants below 97% of the gas requirements of such plants, conclusively shows that the large curtailments which Arkla claims will occur in the future would seriously impair, if not destroy, the ability of Arkla to attract the capital necessary to provide the additional gas supply essential to the welfare of the people of Arkansas.[3] Moreover, such price adjustment clause is unduly discriminatory and preferential as regards to other customers of Arkla. Therefore, dominant considerations of the public interest impel the Commission to exercise the police power delegated to it by the Legislature and to set aside and nullify such price adjustment provisions.

Arkla has submitted a curtailment program as a component part of its proposed General Terms and Conditions. Its curtailment plan for large industrial customers differs in several respects from the curtailment plan submitted to the Commission in Docket No. 2297 and also from the provisions incorporated in most of the special industrial contracts which typically read as follows:

> "This service is interruptible to the exent necessary to supply human needs domestic and commercial consumption and such small industrials as cannot practically be interrupted without interrupting a parity, insofar as parity can practically be obtained, with service to Seller's other indus-

[3] For the 1971/1972 heating, this payment is estimated at $8,918,000 based on the difference between the cost of gas and the cost of fuel oil. The payment would reach much higher levels in future years unless Arkla is able to augment its gas supply.

trial purchasers of Buyer's class served under substantially similar terms and conditions."

Arkla proposes to supersede the contract curtailment provision by a four step formula based on load classifications. In the first category (A) to be curtailed would be large users of gas for boiler fuel where an alternate fuel can be used. After this load classification has been fully curtailed, category (B) loads would be curtailed. This category consists of large users of gas for fuel or as a raw material where an alternate fuel cannot be used and curtailment would require plant production to be curtailed or completely shut down. A third category (C) includes deliveries to small industrials, regular commercial loads and gas for pilot lights or accessory or auxiliary equipment essential to avoid serious damage to industrial plants. The final category (D) includes the human need users of gas for residences, schools, hospitals, churches and other human needs customers. It is not contemplated that this classification will be curtailed absent a Force Majeure catastrophy.

While the industrial customer respondents fully recognized the priority of human needs over their use of gas for industrial purposes, a number of objections were made to Arkla's curtailment proposal. In general these objections centered on Arkla's past administration of the existing contract provisions as to interruptibility and their fear that with massive curtailments in the offing, Arkla's curtailments would not be made on a parity basis. Criticism was made of Arkla's failure to curtail its deliveries to Mississippi River Fuel Corporation and Cities Service Gas Company to the extent permitted by its contracts with the two interstate pipeline companies to the detriment of Arkansas industry. As mentioned earlier, Arkla's proposal curtail-

Arkansas Power & Light Company takes the position that since approximately 50% of its energy requirements are to supply the human needs requirements of its customers which are just as essential as the human needs requirements of Arkla's customers, it should be given a higher priority of service than other industrial customers when gas curtailments become necessary. The 50% as determined by AP&L is based on the requirements of its own retail domestic and commercial customers (41.5%) and its estimate concerning the same class of customer supplied with power sold to its resale customers (16.1%).

The responsibility of this Commission to protect the interest of ultimate consumers of utility services is not confined to gas customers as Arkla seemed to assume throughout this proceeding. On the other hand, "fairness in rates and conditions of service" is not to be construed as a standard which favors a utility customer over other vital industries.

It is no answer to the problem faced by AP&L from Arkla's estimated massive curtailments to point to the interconnections which AP&L has with other utilities and to simply assume that large volumes of electric energy will flow to AP&L whenever it desires to purchase same. AP&L will purchase energy to the extent it is available but the record does not show the existence of any excess firm capacity on the systems of such interconnected utilities which would permit AP&L to secure power whenever Arkla curtailed its supply of gas. Moreover, the evidence reveals the great difficulty inherent in the present highly competitive market of securing large quantities of low sulphur fuel oil at any price. The problems of transportation and of oil storage faced by AP&L is also acute.

The above evidence makes it clear that the utmost con-

sideration must be given to the proposal of AP&L for assuring continuous service to human needs requirements of its residential and commercial customers. Arkansas Power & Light Company experiences its peak demand for electric energy in the summer months, due to its air-conditioning load, while Arkla's peak demand for gas occurs in the winter months. For the five months May through September, 1970, AP&L experienced an average maximum demand of 2,162,200 kilowatts compared with an average maximum demand for the other seven months of 1,545,600 kilowatts. The kilowatt hours of energy output follow a similar pattern.

In 1970, curtailments of gas supply in Mcf by months as determined by AP&L and percent of annual curtailment by months are as follows:

January	3,209,140	22.76	July	None	0.00
February	2,108,057	14.95	August	None	0.00
March	668,892	4.74	September	281,135	1.99
April	221,943	1.57	October	3,800	0.03
May	28,190	0.20	November	2,749,683	19.50
June	None	0.00	December	4,829,002	34.26

Total curtailments represent 13.74% of desired annual requirements in 1970, however, of the total annual curtailments, only 2.19% occurred in the months of May through September. The evidence for the year 1971 indicates annual curtailments will aggregate 37.87%. During the 1971/1972 heating season, normal peak day curtailments of industrial load is estimated to reach 80% of requirements.

The evidence is convincing that it is necessary in the public interest to place the curtailments of AP&L's gas supply on a more restricted basis than other boiler fuel customers who can use alternate fuels. In coming to this con-

clusion, the Commission is not favoring AP&L (which supplies a large portion of electric energy to Arkansas Co-ops) over the other customers in this proceeding. In addition to the impelling public interest in reliable electric service, AP&L, with the only penalty provision in its contracts which the Commission recognizes, is losing, by this Order, supply protection which no other boiler fuel customer enjoys.

The Commission is of the opinion that curtailments of public utilities using gas for boiler fuel to generate electricity for sale should be limited to 25% of their requirements in the five summer months of the year and to 50% of their requirements in the remaining months of the year. This policy affects, under present conditions, a reasonable balancing of the equities among the industrial customers and avoids the serious possibility of jeopardizing service for the human needs of electric utility customers.

The curtailment policy hereinafter prescribed provides for six load or priority classifications. The lowest priority of service applies to customers that purchase gas which may be interrupted or curtailed at Arkla's sole discretion. Ideal Cement Company is the only industrial customer in this category.

The next lowest priority of service includes 100 percent of the load requirements of all industrial customers that use gas for boiler fuel and can use an alternate fuel other than public utility customers. Curtailment of public utility customers in this category are limited to 25% of total daily requirements during the months of May through September and 50% of total daily requirements in the months of October through April.

It appears that some of Arkla's industrial smaller cus-

tomers have not installed fuel burning equipment and adequate fuel storage facilities. Their contracts with Arkla did not require such installation. To avoid an undue hardship, the Commission is of the opinion that customers in such circumstances should be given the opportunity of installing alternate fuel burning equipment and storage facilities before becoming subject to curtailment and our order will so provide. It also provides that if such customers fail to commit themselves to install such facilities, or do not actually do so, they will be placed automatically in the second lowest priority of service.

Next to be curtailed is the balance of public utility boiler fuel load and the fuel for gas engine and turbine driven generation of public utilities which can use an alternate fuel source.

In the fourth lowest priority of service is placed customers who use gas for fuel other than to fire boilers or as a raw material or for processing or manufacturing a product and for generating electricity where an alternate fuel cannot be used, forcing plant production to be reduced or completely shut down.

In the fifth lowest priority of service is placed those industrial customers that use gas for space and water heating, for pilot lights and for operating accessory or auxiliary equipment which is essential to avoid serious damage to plant installations.

Human needs requirement customers (residential and commercial) are placed in the last and sixth lowest priority of service.

The Commission must have, in order to enforce its policy, a continuing record of the load classifications of each industrial customer. Each customer is entitled to be

informed of his particular classification and to be placed in a position to compare his classification with the classifications determined by Arkla for other customers. To accomplish these objectives, the prescribed curtailment rule provides that relevant information will be made available to Arkla, to the customers and to the Commission. Customer information on which curtailment classifications will be made must be furnished to the Commission as well as to the Seller. The Seller will give to the customer and to the Commission a copy of its determination of each customer's load classifications, and the amount of daily load required by such customer in each such classification.

The Commission recognizes that the day-to-day administration of a curtailment schedule must depend on Arkla's managerial judgment consistent with policies set forth herein. However, it is incumbent on Arkla's management to exercise such judgment on the basis of objective criteria to the end that the public interest will be served. The Commission intends to exercise its prerogative to review management judgments in this area and to aid it in doing so, Arkla must maintain certain records and make periodic reports of curtailments to the Commission.

Aside from the matter of curtailment priorities, the evidence submitted by Arkla and other Respondents concerning Arkla's proposed General Terms and Conditions necessitates certain modifications and amplifications thereof. These changes are necessary to achieve the desired objectives of clarity, simplicity, completeness, and technical accuracy. It was recognized by Arkla's witness, J. N. Clayton, that certain modifications of the proposed General Terms and Conditions could be appropriately made by the Commission.

Because of the various and differing provisions of the

49 large industrial tariffs the Commission found it most difficult to achieve absolute uniformity without impinging, to some degree, upon substantive related pricing provisions of the Tariffs. In two instances such provisions appeared to be of such importance to the Buyers and, so intimately related to the pricing provisions, as to warrant exemptions pending further order of the Commission in a subsequent proceeding. However, the Commission is of the opinion that the General Terms and Conditions, hereinafter prescribed, are fair, reasonable and non-discriminatory in respect to all Large Industrial Customers and to Arkla, insofar as it is practical to achieve the same based on the evidence in this proceeding.

In order that Large Industrial Customers may be informed of their right to secure a review by the Commission concerning Arkla's administration of the prescribed General Terms and Conditions in instances where a dispute may arise, we have included in such General Terms and Conditions a notification in respect to such right.

E. COST OF SERVICE EVIDENCE AND FUTURE GAS COSTS

Throughout the course of these proceedings and in its Brief, Arkla has stressed the necessity of securing higher prices for the gas sold to industry to overcome the higher unit cost of gas to be secured from its proposed Anadarko pipeline project. For the purpose of demonstrating the substantially higher unit cost of gas that must be paid by Arkansas rate payers, Arkla witness Edward N. Henderson sponsored Exhibit 19. This Exhibit shows the basis for an estimated increase in the average weighted field cost of gas from the 1969 level of 18.8c by 4.25c per Mcf in 1971, with additional increases to 11.21c per Mcf in 1974. Estimated

maximum increases for the industrial customers above the 1969 level range from 9.88c in 1972 to 12.58c per Mcf in 1974.

The 1969 level of cost is based on a cost allocation by Arkla's witness D. L. Nicol,[1] which was designed to develop the 1969 total cost of service for the Ark-La-Tex system and the allocated cost of service for the Arkansas industrial customers. The cost of serving the industrial customers was determined by Mr. Nicol to be 25.46c per Mcf against an average revenue from Arkansas industrial customers of 26.62c per Mcf, or 1.16c over the cost of service.

An examination of the evidence concerning the cost allocation presented by Mr. Nicol and rebuttal evidence presented by witnesses for industrial respondents reveals flaws in certain aspects of the former. In error is the use of an average of the winter and summer peaks of Arkla for the purpose of determining the demand allocation factors. This procedure is contrary to the logic and rationale of the peak responsibility allocation method, and Arkla failed to demonstrate why this method should be rejected by the Commission. In the Commission's prior decisions[2] concerning the rates of Arkla, we have used the peak responsibility method, with modifications, to reflect a 50-50 division of the transmission fixed costs between the demand and commodity function. Such division is coupled with the utilization of the coincident maximum

[1] Arkla Exhibit 12

[2] See Re: Arkansas Louisiana Gas Company, PSC Docket No. U-1016 (1955), reported at 10 PUR3d 407; and Re: Arkansas Louisiana Gas Company, PSC Docket No. U-1311 (1961), reported at 40 PUR3d 209. The Commission's decision in the first of these cases was upheld by the Arkansas Supreme Court in **Acme Brick Company v. Public Service Commission,** 227 Ark. 486, 299 SW2d 208 (1957).

demand of the system which occurred in the winter months. This method reflects the utilization of most of the system capacity for human needs requirements, since the industrial sales were being heavily curtailed at that time.

The Commission has not been required, in earlier proceedings, to deal with costs associated with underground storage. Since all storage costs are properly assignable to the demand function and are allocated on the basis of the peak responsibility of each customer class, storage costs should be assigned to industrial service only to the extent that such service was not curtailed during the peak period. Utilization of the summer peak as well as the winter peak has resulted in a large share of underground storage costs being assigned to the industrial loads which are curtailed during the winter peak periods and thus can make no use of stored gas. The result of this procedure has been an overassignment of costs to the industrial customer classification.

In addition to the foregoing deficiencies, industrial Respondents allege other errors in the cost allocation, principally Arkla's treatment of the Federal income tax allowance, inclusion of distribution system purchased gas, inclusion of distribution system losses, use of an excessive rate of return for equity capital, use of an excessive amount for capitalization applicable to the Ark-La-Tex system and the determination of the unit value of company produced gas. The Commission finds no reason to evaluate all of such purported deficiencies since it is not necessary for the purpose of this decision to make final judgments, reduced to specific dollar amounts, on cost allocation results. It is sufficient justification for the instant Order that the record conclusively demonstrates that cost allocation principles should have been but were not observed in negotiating industrial contracts, that the impact of costs shifts with

time and unforeseen developments, and the failure of contract terms to reflect this consideration makes discrimination between industrial and other customers inevitable. As gas costs increase, as they almost certainly will, this discrimination will be pronounced. A proper cost allocation study will be essential at some time in the future, when the Commission is faced with the problem of dealing with the justness and reasonableness of all of Arkla's rates.

The evidence establishes that Arkla has been engaged in renegotiating upward the prices set forth in most of its industrial contracts (many successfully) and that such renegotiations have proceeded along the line of securing price increases for the purpose of defraying costs attributable to the Anadarko project. These costs appear principally to be those incurred by Arkla's producing subsidiary Arkla Exploration Company in developing gas reserves in the Deep Anadarko Basin. Inasmuch as the gas expected to be purchased by Arkla from Arkla Exploration Company will undoubtedly reflect all of the latter's costs, or the fair market value, or the FPC area price, no compelling reason was given in this proceedings for the recovery of such costs or a portion thereof through sales being made to Arkla's customers prior to gas from the project being delivered to them. Nor is there evidence that the industrial customers are unwilling to shoulder their fair share of the cost of the Anadarko gas whenever it is made available to them. On the other hand, the Commission must be in a position to insure that they do.

It should also be emphasized that only the rates set out in the Large Industrial Tariffs hereinafter specified will be the lawful rates to be charged by Arkla. Hereafter, such tariff rates may be charged only in strict compliance

with the Laws of Arkansas and the Rules and Regulations of this Commission.

Unreasonable discrimination presently exists in the industrial contracts with respect to prices and other provisions. By this Order, the Commission contemplates to eliminate those discriminatory results of negotiated contracts which the record reveals to be injurious to the public interest. Other adjustments appear to be required, and the Commission intends to institute formal proceedings for the purpose of determining just and reasonable rates for gas supplied to industrial customers under the Large Industrial Tariffs of Arkla, and to thereafter prescribe uniform rates for gas sold by Arkla to industrial customers with similar service characteristics and appropriate and fair additions to the Terms and Conditions controlling such service.

F. FINDINGS

In addition to the conclusions heretofore expressed, the Commission further finds:

1. It is in the public interest that the natural gas available to Arkla for sale to the people of Arkansas be utilized for the greatest good of the greatest number of people. To secure this objective, the Commission must exercise continuing surveillance of all of Arkla's gas sales.

2. After examination of the individual and collective impact on Arkansas' people and industry of the Commission's procedure whereby Commission approval was given, by Order, to contracts privately negotiated between Arkla and large industrial gas customers, the Commission finds that such procedure:

(a) has been, is now, and will be, fatally inflexible

Arkla pursuant to said undisclosed agreement should be recorded and identified separately by Arkla in its reports to the Commission, and should not be considered a cost attributable to Arkla's utility business.

10. The rates and charges set forth in the aforementioned Large Industrial Tariffs fail to comport with sound rate making principles in that they do not provide uniform rates for the same service nor do the levels of the rates in the Industrial Tariffs reflect any appropriate relationship to curtailment priorities or to the cost of providing the service.

11. The record does not contain the quantum of essential evidence which would permit the Commission to prescribe all just, reasonable and non-discriminatory industrial rates and charges for Arkla and such determinations should be deferred to a subsequent proceeding.

12. It is necessary and appropriate for the purpose of the Commission's performance of its duties and obligations that detailed reports of Arkla's reserves, deliverability, and the cause, duration, and identification of those curtailments be available to the Commission's staff, Arkla's customers and the public.

IT IS ORDERED:

In addition to these guidelines and directions heretofore expressed, the Commission further orders:

1. Effective today, the Orders issued approving contracts in the Docket Numbers identified below, are hereby rescinded:

COMPANY	DOCKET NO.
Acme Brick Company	U-1961
Aluminum Co. of America	U-1945

American Oil Company	U-2000
Arkansas Chemicals, Inc.	U-1673
Arkansas Elec. Coop. Corp. (Augusta)	U-1819
Arkansas Elec. Coop. Corp. (Augusta)	U-2072
Arkansas Elec. Coop. Corp. (Camden)	U-2070
Arkansas Elec. Coop. Corp. (Ozark)	U-2071
Arkansas Elec. Coop. Corp. (Ozark)	U-1583
Arkansas Kraft Corp.	U-1967
Arkansas Power & Light Company H. Springs, NLR, Stamps	U-1443
Arkansas Power & Light Company Helena	U-1892
Arkansas Power & Light Company Helena	U-1383
Arkansas Power & Light Company Helena	U-2272
Arkansas Power & Light Company Hot Springs	U-2025
Arkansas Power & Light Company Mabelvale	U-2271
Ark. Lightweight Aggreg. Corp.	U-1960
Arkla Chemical Corp. Gurdon	U-1987
Arkla Chemical Corp. Helena	U-1891
Baroid Div., Nat'l. Lead Co.	U-1950
Benton Light Impr. Dist. No. 1	U-1985
Berry Petroleum Co. (Stephens)	U-1952
Berry Petroleum Co. (Waterloo)	U-1951
Bromet Company	U-2192
The Celotex Corporation	U-1986
Columbia Carbon	U-1476
Continental Oil Co.	U-1850
Conway Light, Power & Water	U-2032

Cross Oil & Ref. Co. of Ark.	U-1953
Dierks Div., Weyerhaeuser Co.	
Pine Bluff & Perkins	U-1983
Dierks Div., Weyerhaeuser Co.	
Dierks	U-2223
Elk Roofing	U-1984
Great Lakes Chemical Corp.	U-1955
A.P. Green Refractories Co.	U-1963
Ideal Cement Company	U-2269
International Paper Company	
Pine Bluff, Camden, Malvern	U-1962
MacMillan Ring-Free Oil Co.	U-1947
Magnet Cove Barium (Dresser Magcobar,	
Div. of Dresser Inc.)	U-1954
Malvern Brick & Tile Co.	U-1948
Minnesota Mining & Mfg. Co.	U-1949
Monsanto Company	U-1444
Monsanto Company	U-2038
Nekoosa Edwards Paper Co.	U-2036
Olinkraft, Inc.	U-2221
Phillips Petroleum Co. and	
Humble Oil & Refining Co.	U-1966
Remington Arms Co., Inc.	U-2222
Reynolds Metals Co.	
Bauxite, Lake Catherine & Hot Springs	U-1965
Reynolds Metals Co.	
Arkadelphia	U-1964
Union Carbide Corp.	U-2037
United States of America	
Pine Bluff Arsenal	U-1282

and each and every industrial gas sales contract subject to this Order, not limited to the list above, is hereby designated as a Large Industrial Tariff.

2. Each industrial gas sales contract shall hereinafter be identified by that designation, followed by the Docket Number, if any, assigned by the Commission to that Order, if any, issued when the respective superseded contracts were approved.

3. Service under such Tariffs shall be subject to the General Terms and Conditions Applicable to Large Industrial Customers appended hereto and made a part hereof as Appendix A, and also subject to other conclusions, guidelines, and findings in this Order.

4. The subject matter contained in said General Terms and Conditions shall supersede and replace the provisions in each Large Industrial Tariff to the extent that the latter are inconsistent with or contrary to the General Terms and Conditions.

5. The provisions in Section 15 of the Tariffs applicable to the Helena No. 2 unit and the Lake Catherine No. 4 unit of Arkansas Power & Light Company requiring payments to be made by Arkla to AP&L of the difference between the weighted average price per Mcf paid by Buyer to Seller for gas purchased under each tariff and the weighted average cost of fuel oil burned by Buyer due to curtailment imposed by Seller in excess of three (3) percent of the volumes of gas that would have been delivered during the year if curtailment had not occurred, shall hereafter have no force and effect.

6. Arkla shall maintain for a period of not less than five (5) years following the end of a particular calendar year the following records:

(a) Dispatchers daily log sheet showing hourly reports of pressures and volumes.

(b) Dispatchers curtailment work sheets for each day showing curtailments ordered with respect to each customer.

(c) Curtailment date for each day showing for each customer (1) notifications, (2) date and time curtailment started and stopped, (3) percent of curtailment, and (4) Mcf per hour curtailed.

7. Arkla shall hereafter submit to the Commission no later than the 15th day of each month a report for the preceding month which will include the following information applicable to (a) the total Ark-La-Tex integrated system, and (b) the individual non-integrated systems located in the State of Arkansas:

(1) Total volume (Mcf) of curtailments occurring each day of the month (7 a.m. to 7 a.m.) for each load classification specified in Section 12 of General Terms and Conditions appended hereto.

(2) Names of customers curtailed in each load classification, their daily volumetric requirement (Mcf) and volume (Mcf) curtailed for each day and total curtailment (Mcf) for month.

(3) Reason for daily curtailment; i.e., (a) shortage of supply at source, (b) lack of main line or lateral transmission line capacity to serve all customer requirements due to low temperatures or other condition on system or specific portion thereof, (c) necessity to fill storage reservoirs and (d) Force Majeure. In case of Force Majeure describe in detail the cause and general effect of service interruption, the extent of curtailment

necessary, the number of customers affected and the time span of interruption.

(4) System "send-out" in Mcf for each day.

(SEAL)

BY ORDER OF THE COMMISSION

This 9th day of August, 1971.

/s/ Pat Moran, Chairman

/s/ Robert C. Downie, Commissioner

/s/ Don S. Smith, Commissioner

/s/ Robert M. Vaughan, Secretary

APPENDIX A

GENERAL TERMS AND CONDITIONS APPLICABLE TO LARGE INDUSTRIAL CUSTOMERS

1. *DEFINITION OF TERMS*

The following terms when used in these General Terms and Conditions and in each Large Industrial Tariff shall be construed to have the following meaning, except where the context of their use in an Industrial Tariff clearly indicates another meaning:

(a) The term "day" or "daily" shall mean a period of twenty-four (24) consecutive hours, beginning and ending as near as practicable to 7:00 a.m., Standard or Daylight time, at the point at which delivery of gas is made.

(b) The term "month" or "monthly" shall mean the period beginning at or as near as practicable to 7:00 a.m., Standard or Daylight time, on the first day of the calendar month and ending as near as practicable to 7:00 a.m., on the first day of the next succeeding calendar month.

(c) The term "year" shall mean a period of three hundred sixty-five (365) consecutive days beginning on the date specified in the Industrial Tariff as the commencement of the terms of service or initial delivery of gas thereunder or any anniversary thereof; provided, however, that any year which contains a date of February 29 shall consist of three hundred sixty-six (366) consecutive days.

(d) The term "cubic foot" shall mean the volume of

gas which occupies one (1) cubic foot when said gas is at a temperature of sixty degrees (60°) Fahrenheit, and at a pressure of 14.9 pounds per square inch absolute.

(e) The term "Mcf" shall mean one thousand (1,000) cubic feet of gas.

(f) The term "BTU" is the abbreviation employed to denote a British Thermal Unit.

(g) The term "Large Industrial Customer" shall mean those industrial customers which consume gas for manufacturing, generation of power, processing, preparation of product or other industrial purpose and are served under Sellers Large Industrial Tariffs.

2. *USE OF GAS*

Gas delivered by Seller to Buyer is for Buyer's own use and shall not be resold.

3. *BILLING AND PAYMENT*

Seller's monthly bills will be rendered promptly after the close of each calendar month and shall be paid within 15 days after the date of which the bill was rendered at the address designated under Section 13 hereof. Upon default in payment for a period in excess of 30 days after payment is due, Seller may suspend delivery of gas until satisfactory credit arrangements have been made. Seller may require as a condition of commencement or continuation of service a reasonable refundable deposit or bond or increase in an existing deposit or bond at any time to secure payment of bills, such deposit not to exceed an amount equivalent to two estimated maximum bills. Interest at the rate of six percent (6%) per annum or as may be other-

wise prescribed by law or this Commission shall be paid on such deposit amount.

4. *MEASUREMENT*

Except as may be otherwise specifically required by law, the measurement and testing of gas delivered and received hereunder shall be in accordance with the following:

(a) The unit of volume shall be 1,000 cubic feet of gas (Mcf) at a temperature base of 60° Fahrenheit and at a pressure base of 14.9 pounds per square inch absolute. Whenever the actual conditions of pressure and temperature of the particular gas stream being measured differ from the above standard, conversion of the volume from such actual conditions to the above standard conditions shall be made in accordance with the Ideal Gas Laws, corrected in every instance for supercompressibility in accordance with the method customarily used by Seller in computations which are subject to the Standard Gas Measurement Law of the state in which the gas is delivered.

(b) Measurements of gas shall always be in accordance with the requirements of law, and if the procedures, bases, or standards herein contemplated to be used in the determination of gas volumes are changed by law or regulatory action, then the applicable rates shall be appropriately modified and adjusted to the extent necessary to the end that calculations to determine sums of money due Seller for the gas after the change will reach the same end result in dollars and cents as would have been reached in the absence of such change.

(c) Seller shall install, operate and maintain at its own expense appropriate equipment at or near point of delivery to measure and determine volumes delivered. Orifice meters, if used, shall be installed and operated, and volumes computed, in accordance with the American Gas Association Gas Measurement Committee Report No. 3, dated April, 1955, and Appendices thereto and amendments thereof.

(d) The temperature of the gas at each point of delivery shall be, (i) determined by taking the average of the hourly readings of an indicating thermometer, or (ii) assumed by mutual agreement to be 60° Fahrenheit, or (iii) determined by recording thermometer, provided that, if Seller is not using a recording thermometer, Buyer shall have the right, by reimbursing Seller the cost of the equipment and its installation, to require the use of a recording thermometer, the equipment to be owned and operated by Seller.

(e) The specific gravity of the gas shall be determined for each point of delivery in accordance with good engineering practice as often as found necessary in actual operation.

(f) Seller shall install, own, operate and maintain standard type measuring and testing equipment necessary hereunder and shall keep same accurate and in repair. Readings, calibrations, tests, repairs and adjustments of said equipment, and changing of charts shall be done only by employees or agents of Seller and in accordance with good engineering practice as often as found necessary in actual operation. Buyer shall have access to Sell-

and save it harmless from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties, taxes, license fees or charges thereon, which are applicable before the title to the gas passes to Buyer.

II. DELIVERY, POSSESSION OF GAS AND RESPONSIBILITY

(a) The point of delivery, where title to and responsibility for the gas shall pass to Buyer, shall be at the outlet of Seller's metering facilities to be installed and operated by Seller at the point designated in the Tariff. Seller shall have access to Buyer's premises at any reasonable time for any purpose connected with this service.

(b) Seller shall install, operate and maintain whatever facilities are necessary to deliver the gas at the point of delivery and shall indemnify Buyer and hold it harmless from and against any and all claims, actions, suits, damages, liabilities, costs and expenses arising out of use, possession or ownership of the gas before it passes the point of delivery. For a new service, construction of Seller's delivery facilities shall commence as soon as the necessary materials and rights of way are available and all regulatory approvals and authorizations required by law, if any, have been obtained on conditions satisfactory to Seller.

(c) Buyer shall install, operate and maintain at its own expense whatever facilities are necessary to utilize, receive and utilize the gas at and beyond the point of delivery, and shall indemnify Seller and hold it harmless from and against any and all

claims, actions, suits, damages, liabilities, costs and expenses arising out of the use, possession, or presence of the gas after it passes the point of delivery.

7. *SEPARATE PREMISES*

Separate customer premises shall be metered and billed separately even under common ownership, and combined metering or billing shall not be permitted. Such premises shall be considered separate when not on the same tract, or contiguous tracts, of land or when each is a complete "unit", not physically integrated with or essentially a part of the other, or others, and each renders a complete service or produces a finished product. Tracts of land separated by public streets, roads, or alleys are presumed to be non-contiguous tracts.

8. *DELIVERY PRESSURE*

Gas will be delivered at the point of delivery at such pressure as may be mutually agreed upon but not greater than line pressure and such pressure shall be stated in the Tariff. The Customer agrees to properly handle and regulate the pressure of the gas after delivery to it by the Company at the point of delivery.

9. *QUALITY*

(a) Heating Value of Gas

Gas delivered will contain not less than 950 British Thermal Units (BTU) per cubic foot. Buyer shall not be required to accept natural gas having a unit heating value of less than 900 BTU. The average heating value of the gas delivered by Seller shall be determined by the use of a reliable calorimeter located at such place or places on its transmission system as Seller may

select. Adjustments, if any, for deviation from 950 BTU will be made in accordance with Tariff provisions, pending further order of the Commission.

(b) Other Quality Requirements

The gas delivered must contain not more than 1 grain of hydrogen sulphide per 100 cubic feet and not more than 20 grains of total sulphur per 100 cubic feet. The gas must be clean, dry, and merchantable and commercially free of dust or other solid or liquid matters, which might cause injury to or interference with proper operation of the customers' appliances. Seller shall use its best efforts consistent with the prudent operation of its pipeline system to deliver gas meeting the foregoing specifications, but Seller does not undertake to guarantee the supply to Buyer of gas meeting the requirements of this paragraph and shall not be liable in damages for failure to do so.

(c) Buyer shall not be obligated to receive any gas tendered for delivery which does not meet the foregoing specifications and shall have the right to terminate its obligations to take service if Seller does not bring the gas up to specifications within 30 days after written notice from Buyer that it is below specification; provided, however, that Seller will honor quality provisions of existing Tariffs that are more favorable to Buyer pending further Order of the Commission.

10. *ODORIZATION*

It is not contemplated or intended that Buyer will use gas for any purpose requiring odorization under State or Federal laws. Buyer shall be responsible for any such other use of the gas requiring odorization and for compliances

with any and all laws and rules and regulations of regulatory authorities with jurisdiction regarding odorization. Buyer shall indemnify Seller and hold Seller harmless from and against any and all damages, liabilities, and claims arising out of Buyer's failure to comply with the undertakings of this paragraph.

11. *FORCE MAJEURE*

The obligations of the parties (other than to make payments due) shall be suspended so long as and to the extent that performance is prevented by fire, labor disputes, acts of God, the elements, wars, epidemics, riots, civil disturbances, explosions, breakage of, accident to or repairs, tests, or alterations on machinery, equipment, or pipelines, freezing of wells or pipelines, temporary failure of gas supply, and any other cause, similar or dissimilar, not within the reasonable control of the party claiming relief, provided that notice and full particulars of the event relied on will be given in writing or by telegraph to the other party as soon as possible. The party affected shall remedy the cause of suspension with reasonable dispatch, retaining to such party unqualified discretion in settling labor disputes.

12. *CURTAILMENT AND PRIORITY OF SERVICE*

(a) GENERAL

(1) Seller recognizes its public service obligation to maintain gas service to domestic, commercial and other customers for the primary benefit of human needs. In the event Seller may find it necessary, from time to time, in the operation of its systems to curtail or interrupt the delivery of gas to its industrial customers by reason of Force

Majeure or in order to supply human need requirements, curtailment shall be made without liability to Buyer in the order of load classifications set forth in paragraph (b) below.

(2) 100 percent curtailments will be made to Category I loads before any curtailments are made to Category A loads. 100 percent curtailments will be made to Category A loads before any curtailments are made to Category B loads, and etc. Within a category, curtailments of load will be instituted in a simultaneous, fair and equitable manner to the extent practicable based on parity with deliveries to all customers in the same category, with due regard to localized conditions of supply and pressure and to the efficient operation of Seller's system.

(3) "Daily load requirements", as that term is used in the several Load Classifications, means the normal load requirements of the Buyer at the time curtailment is ordered by dispatcher.

(4) Curtailments to Arkansas industrial customers must, insofar as Seller is able, be on a parity with all customers of Seller in like categories.

(b) LOAD CLASSIFICATIONS

CATEGORY 1

Customers who purchase gas which is subject to curtailment or interruption at Seller's sole discretion under a

Tariff provision which does not impose an obligation on Seller to sell or on Buyer to buy at any time a fixed volume of gas.

CATEGORY A

Customers who use gas for boiler fuel where alternate fuels can be used, subject to conditions (1) and (2) below. Curtailment percentages will be applicable to 100 percent of the daily load requirements of industrial customers in this category.

(1) Customers in this category and not subject to condition (2) who have neither completed nor substantially completed installation of alternate fuel burning equipment and fuel storage facilities with capacity adequate to meet their daily load requirements at the effective date of this Order, will be classified in Category C during the period September 1, 1971 — August 31, 1972, provided that: such customers submit a written agreement to Seller and to the Commission within 30 days from date hereof to install such equipment and facilities within the above specified period. Failure to submit such agreement will immediately result in placement of customer in Load Classification A.

(2) Public utility customers using gas for boiler fuel to generate electricity for sale will be curtailed only to the extent of 25 percent of their daily load requirements during the months of May through September. For the months of October through April, such customers will be curtailed no more than that portion of demand adequate to generate electric energy for its customers whose use of electricity most nearly corresponds to the uses of natural gas described in Cate-

gories "D" and "E" herein. This proportion shall be presumptively 50% of their daily load requirements during the months of October through April.

CATEGORY B

(1) Public utility customers who use gas for boiler fuel where alternate fuels can be used which have been already curtailed by 25 or 50 percent of their daily requirements under Category A.

(2) Public utility customers who use gas for engine or turbine driven generators where an alternate fuel can be used.

CATEGORY C

Customers who use gas for fuel or raw material or for processing or manufacturing a product and for generating electricity when an alternate fuel cannot be used and operations and plant production would be reduced or shut down completely when gas deliveries are curtailed.

CATEGORY D

Customers whose use of gas in industrial plants for space and water heating, pilot lights or for operating accessory or auxiliary equipment is essential to avoid serious damage to plant installations.

CATEGORY E

Residential and commercial customers whose use of gas is for space heating and cooling, water heating, cooking, lighting, refrigeration and other human need purposes.

(c) CUSTOMERS WITHIN TWO OR MORE CATEGORIES

If gas delivered to a particular customer is used for

two or more of the herein specified load classifications, curtailment of such deliveries will be based on the requirements of each individual load classification to the extent practicable.

(d) OBLIGATION OF BUYER

Within 30 days after the effective date hereof, or before service commences, or when subsequent changes are made in requirements for gas, all customers subject to curtailment under Load Classifications Categories A, B, C and D will furnish Seller the information reasonably required by Seller with regard to gas usage at the facilities served, in order that Seller may determine the proportionate parts, if any, of the usage falling in the above curtailment categories. Failure to furnish such information will automatically result in the customer being placed by Seller in Load Classification Category I.

13. *NOTICES*

Any notice, request, demand, statement or bill provided for in these General Terms and Conditions and the contracts to which they apply, or any notice which either the Company or the customer may desire to give to the other, shall be in writing and if delivered shall be considered as duly delivered when mailed by registered mail to the Post Office address of the Company or the Customer or at such other address as either shall designate by formal written notice. Routine communications, including monthly statements and payments if delivered, shall be considered as duly delivered when mailed by either registered or ordinary mail.

14. *OPERATING INFORMATION AND FORECASTS*

The Buyer, upon request, shall furnish Seller such reasonable data, in Seller's judgment, as are necessary for the proper analysis of the daily and annual gas load requirements of Customer.

Annually, by September 1 of each year, Buyer shall submit to Seller; by letter, Buyer's best estimate of its daily and annual requirements for the industrial facility, by months, for the following calendar year, for Seller's use in managing its system and forecasting its requirements. In turn, Seller will give Buyer a letter by October 1 of each year containing Seller's best estimate of deliverability of Buyer's requirements and probable curtailments, if any.

15. *COMPANY FACILITIES ON CUSTOMER'S PREMISES*

When gas is connected to a new industrial plant, Buyer will purchase from Seller at its cost all facilities on Customer's premises necessary to effect deliveries to Buyer's plant within 30 days after receipt of Seller's statement following completion of installation. The term "facilities" includes the pipeline, the connecting meter run, separator; regulator and all related facilities necessary to move the gas from the company's pipeline at the property line to the point of delivery and deliver it in accordance with the provisions hereof. The term "cost" includes the cost of pipe, materials, equipment and other facilities, and cost of installation and other related costs. The title to all meters and other facilities and equipment, etc., placed on Buyer's premises, and not paid for by Buyer, shall remain in Seller, with right of removal, and no charge shall be made by Buyer for use of premises occupied by same.

16. *LATERAL LINE POLICY*

The Seller will not be required to extend its pipeline system to furnish service to a prospective Large Industrial Customer or to enlarge its pipeline system to provide for an appreciable increase in the demand of an existing Customer unless it deems such extension or enlargement to be economically feasible in terms of receiving a reasonable return on its expenditure.

17. *GOVERNMENTAL APPROVALS AND AUTHORIZATIONS*

(a) The sale and delivery of gas by Seller is subject to the orders, rules and regulations of duly constituted authorities having jurisdiction over either or both seller and Buyer.

(b) Seller's obligations to render service are subject to its obtaining within a reasonable time an appropriate order or certificate from the Federal Power Commission, when such order or certificate is required to be obtained, on conditions acceptable to Seller, authorizing the construction and operation of the facilities necessary to effect sale of gas to Customer.

18. *RIGHT TO SECURE COMMISSION REVIEW OF ADMINISTRATION OF GENERAL TERMS AND CONDITIONS*

Buyer may submit to the Commission, for its consideration and decision, the subject matter of any dispute concerning the administration by Seller of the General Terms and Conditions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.

No. 71-1040

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., *Petitioners*

v.

LOUISIANA POWER & LIGHT COMPANY

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF FOR MONSANTO COMPANY AND TEXAS GULF SULPHUR COMPANY AMICI CURIAE

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---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Monsanto Company and Texas Gulf Sulphur Company respectfully move for leave to file the attached brief as amici curiae.

The Federal Power Commission (FPC) states that the decision it is seeking herein will control "several cases pending in the Federal Courts," including two suits brought by Monsanto and Texas Gulf against United, and an appeal by Monsanto from an order of the Commission.[1] The FPC characterizes these as

[1] See FPC Br. 17 and n. 10.

"similar suits,"[2] when describing the action brought by Louisiana Power & Light Company (LP&L).

The suits and appeals brought by Monsanto and Texas Gulf are not similar to the action brought by Louisiana Power & Light Company. The facts and arguments of law respecting this distinction are not now before this Court. It would constitute a denial of justice for this Court to prejudge those suits and appeals on the basis of the briefs and record submitted by the Commission, United and their supporters.

Louisiana Power & Light Company's suit is essentially one for specific performance. By contrast, Monsanto and Texas Gulf have sued United in District Court for damages arising from United's failure to provide service in accordance with the impairment of service and other provisions of its contracts with these two direct customers.[3] The Commission admittedly has no jurisdiction to award damages for breach of contract.[4]

In the same suits Monsanto and Texas Gulf have also sought injunctive relief, but it is quite different from that requested by LP&L. The District Court was asked to prevent United from unlawfully enlarging its sales

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[2] FPC Br. n. 10.

[3] *Monsanto Co.* v. *United Gas Pipe Line Co.*, (D.D.C.) Civil Action No. 2037-71; order of dismissal on the grounds the FPC had exclusive jurisdiction appealed, *Monsanto Co.* v. *United Gas Pipe Line Co.*, No. 72-1093 (C.A.D.C.).

Texas Gulf Sulphur Company v. *United Gas Pipe Line Co.*, (D.D.C.) Civil Action No. 2253-71; order of dismissal on the grounds the FPC had exclusive jurisdiction appealed, *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, No. 72-1094 (C.A.D.C.) These appeals were argued together with the appeal described in footnote 5, *post*, on March 13, 1972.

[4] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944).

to some customers at the expense of curtailing other firm customers.

Further, having been advised by United in August 1971 that it would curtail gas supplies to their plants fully and totally at times during the 1971-1972 winter season, Monsanto and Texas Gulf ased the District Court to require United to deliver the *minimum* volumes needed to keep their plants from closing down, pending a determination of their rights.

Because the injury they alleged involved violations of the Natural Gas Act, Monsanto and Texas Gulf based their suits not only on breach of contract and breach of fiduciary duty, but also on Section 22 of the Natural Gas Act (15 U.S.C. § 717u) which provides a means of supplementing the Commission's enforcement of the act by private suits for damages and injunctive relief.

Monsanto is separately challenging in the Court of Appeals an order of the Commission approving a settlement as to United's curtailments during the 1970-1971 winter because the order was based on a record containing United's direct case which Monsanto had not been afforded an opportunity to cross-examine. Nor had Monsanto been allowed to complete discovery or present rebuttal evidence.[5]

The problems raised by the suits and appeals of Monsanto and Texas Gulf cannot be resolved by an argu-

[5] *Monsanto Co.* v. *Federal Power Commission*, No. 71-1306 (C.A.D.C.) Through discovery efforts effected subsequent to the Commission's order, Monsanto found that United had concealed from the Commission the fact that confidential in-house studies showed as early as June 1968 that United's gas supplies were depleted to the point where deficits could be anticipated in 1968-1969 and succeeding winters. Nonetheless, United initiated very large volumes of additional firm gas service in the fall of 1968 and in every year since then. The additional firm service could only be provided by curtailing firm service already being rendered to other customers.

Monsanto's competitive position in domestic and international markets.

Monsanto has sought to make United accountable for its actions in proceedings before the Commission,[3] through appeal from orders of the Commission,[4] and by a suit in District Court.[5]

United contracted in 1967 to provide the full natural gas requirements of Texas Gulf's Bully Camp Sulphur Mine up to 10,100 Mcf per day on a firm basis. This is a frasch process installation, located in the bayou country of Lafourche Parish, Louisiana, capable of injecting up to 3,000,000 gallons of superheated water a day into a suphur-bearing formation located more than 1200 feet below the marshes.

The Mine would not have been developed if United had not given its assurances that the gas supply was certain for the twenty year term of the contract. Operations commenced in May 1968. Yet United is currently ordering curtailments of gas deliveries so severe that, if complied with, they would force Texas Gulf to close the Mine, discharge 90 employees in an area offering few reemployment opportunities, and abandon over one million tons of sulphur forever under the ground. Texas Gulf will lose its remaining $10,000,000 investment in the Mine if operations are shut down by gas curtailments.

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[3] *United Gas Pipe Line Co.*, Docket Nos. RP71-29, RP71-120.

[4] *Monsanto Co.* v. *FPC*, No. 71-1396 (C.A.D.C.).

[5] *Monsanto Co.* v. *United Gas Pipe Line Co.* (D.D.C.) Civil Action No. 2037-71; order of dismissal on jurisdictional grounds appealed. *Monsanto Co.* v. *United Gas Pipe Line Co.*, No. 72-1093 (C.A.D.C.) The nature of the relief sought by Monsanto is described in its Motion for leave to file brief amici curiae, pages 2-3.

Texas Gulf has also sought to make United accountable for its actions, and to prevent the destruction of this part of its business [6] which produces and markets sulphur in competition with Duval Corporation, an affiliate of United.[7]

The Commission would have this Court believe that the suits and appeals brought by Monsanto and Texas Gulf are "similar" to the suit for specific performance brought by Louisiana Power & Light Co. and asserts that a decision here will control those cases. (FPC Br. 17 and n. 10) This Court should not allow United to escape its responsibilities so easily.

SUMMARY OF ARGUMENT

I. The natural gas industry is based on a wasting asset. That their natural gas supplies do become exhausted is respected not only in the character of the terms of the contracts executed by the pipeline companies but also by the provisions of the Natural Gas Act designed to regulate their activities. Long range supply-demand planning is the hallmark of this industry.

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[6] Texas Gulf sued United for damages, to enjoin United from reducing deliveries below a minimum of 1500 Mcf per day and an average day volume of 7,000 Mcf (70 percent of its firm contract) needed to keep the plant operating, and to enjoin United from unlawfully enlarging its sales at the expense of further curtailments of Texas Gulf and other firm customers. *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, (D.D.C.) Civil Action No. 2253-71; order of dismissal on the grounds the FPC had exclusive jurisdiction appealed, *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, No. 72-1094 (C.A.D.C.).

The Commission has declined to order United to provide the Mine with an average of 7,000 Mcf per day. Order issued January 28, 1972 in *United Gas Pipe Line Co.*, Docket Nos. RP71-29 and RP71-120. The matter is pending, after two days of hearings on March 27 and 28, 1972 on Texas Gulf's application for rehearing.

[7] Duval Corp., like United, is a wholly-owned subsidiary of Pennzoil United, Inc.

A. United's direct sales contracts and its FPC Gas Tariff contain a consistent order of priorities which protects domestic gas service by giving it the highest priority in times of gas shortages.

B. United's gas supply difficulties are due to its aggressive, improvident and unlawful enlargement of sales at a time when it lacked the gas reserves to support the new service without curtailing old service; and to its failure to curtail service in accordance with the impairment of deliveries provisions of its direct sales contracts and Tariff. This is not a "gas shortage" within the meaning of United's contracts and Tariff.

C. Congress respected the wasting asset nature of the industry by leaving to the pipeline company the decision whether to attach new service or to enlarge old service. But once the pipeline company initiates a firm service, the consumer which has given up its options to use other sources of fuel, may not be abandoned in favor of a better prospect without a hearing, proof and finding that abandonment under Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), is permitted by the public convenience and necessity or the available supply of material gas is depleted to the extent that the continuance of service is unwarranted.

D. Sections 1(b), 4, 5 and 16 of the Act, 15 U.S.C. §§ 717(b), 717c, 717d, and 717o, do not provide consumers with adequate safeguards against abandonment of gas service. They encourage the pipeline to rewrite its service obligations when its gas supplies are short, the very time when adherence to those obligations is most important to the consumer. United is simply seeking to use these provisions to sanction abandonment of gas service without meeting first the rigorous standards of Section 7(b) of the Act.

E. Gas pipeline companies owe a fiduciary obligation to their long-term firm customers to conserve system gas supplies to support the service initiated.

II. Private persons injured by violations of the Natural Gas Act are intended by Section 22 of that statute, 15 U.S.C. § 717u, to provide through private suits for damages and injunctions "a most effective weapon" for enforcement of the Act.

III. The Federal Power Commission litigated before the District Court the question of jurisdiction over United's "Green System" in Southern Louisiana. The Court of Appeals having found, on the basis of that record, that the Commission had no jurisdiction, its decision ought not be disturbed until an evidentary record is presented either before the Commission or in another District Court suit requiring a different conclusion.

ARGUMENT

I.

IN AN INDUSTRY IN WHICH FORWARD DEMAND-SUPPLY PLANNING IS THE UNIVERSAL PRACTICE, A REGULATED NATURAL-GAS PIPELINE COMPANY SHOULD NOT BE ALLOWED TO ESCAPE ITS GAS SUPPLY OBLIGATIONS WITHOUT COMPLYING FIRST WITH THE ABANDONMENT PROVISIONS OF SECTION 7(b) OF THE NATURAL GAS ACT.

The Commission and United assert that the Commission has exclusive jurisdiction over curtailments of interstate natural gas service under Sections 1(b), 4(b), 5(a) and 16 of the Natural Gas Act.[8] Their arguments ignore the history and character of the industry being regulated, and misapprehend the nature and purpose of the regulations imposed by Congress.

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[8] 15 U.S.C. §§ 717(b), 717c(b), 717d(a) and 717o.

Whatever powers the Commission has to reduce firm gas service are to be found in Section 7 of the Act,[9] and even those powers are not plenary.[10]

A better understanding of why this is so can be obtained from a brief review of the nature of the natural gas pipeline industry and the type of regulation carefully designed by Congress to meet the primary need of protecting consumers from exploitation at the hands of the pipeline companies.[11]

A. The Natural Gas Industry Markets A Wasting Asset.

The natural gas pipeline industry is based on a wasting asset. Every day a pipeline company is in business, it witnesses the exhaustion of a part of its gas supplies. Unless it finds replacement supplies, it eventually must cease operations altogether. Under the circumstances, service can be expanded prudently only if the pipeline company obtains not only sufficient supplies to preserve its capacity to serve existing customers, but also requires additional reserves large enough to support the new service without curtailing existing firm service.

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[9] 15 U.S.C. § 717f.

[10] The Commission has asked Congress to enlarge its jurisdiction to curtail loads and allocate gas in case of emergencies by enacting a new subsection to Section 7 giving it that authority. *FPC Annual Report, 1970*, p. 8 (1971).

[11] *Sunray* v. *Midcontinent Oil Co.* v. *FPC*, 364 U.S. 137, 147 (1960). The Commission appears to ignore the fact that direct sales customers, such as Monsanto and Texas Gulf, are consumers protected by the Natural Gas Act against exploitation at the hands of a natural gas company. Direct industrial consumers are not outlaws, to be injured with impunity. They are not inferior under the law to wholesale customers. Nor can service to them be prohibited by the Commission as a general proposition. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 23-24 (1961).

These were the essential facts of life of this industry in 1938 when the Natural Gas Act became law.[12] They are true today. The Natural Gas Act, like the curtailment provisions of the contracts between United and its wholesale and direct customers,[13] was drafted to meet the public interest needs created by this risky situation and to protect consumers being served by exhaustible gas supplies. Like the curtailment provisions of United's contracts, the provisions of the Act are quite precise and adequate to the situation now before this Court. The fact that United Gas Pipe Line Company failed in 1970, 1971 and 1972 to meet the requirements of its customers does not require a judicial rewriting of the provisions of the Natural Gas Act.

B. Congress Recognized the Depleting Nature of the Industry in Drafting the Natural Gas Act.

Congress carefully left to each pipeline company the essential decision as to what service it will add to its system. The Commission reviews each proposal involv-

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[12] During hearings on H.R. 11662, a predecessor of the bill which became the Natural Gas Act, Congressman Lea presiding, observed:

> "Mr. Lea. There is one problem that suggested itself to me this morning in the startling figures about the extent of gas production and its great development as carried on in recent years, and that is as to what would happen if this supply should be rapidly depleted with so many industries and perhaps homes depending on it." Hearing on H.R. 11662, to regulate the transportation and sale of natural gas in interstate commerce and for other purposes, before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. p. 65 (1936).

[13] For ease in comparison, the curtailment provisions from the United-Monsanto contract and the similar provisions of United's FPC Gas Tariff which were in effect during the period covered by the damage suits brought against United by Monsanto and Texas Gulf are set out in Appendix B hereto.

ing its jurisdiction and decides which are required by the public convenience and necessity.[14] But it is the pipeline company which has both the initial and the ultimate responsibility for determining what market obligations its gas supply situation will support.

These obligations are spelled out in contracts.[15] The Commission can compel the pipeline company to undertake additional service under very restricted circumstances, but never when the new service would impair the pipeline's ability to provide service to existing customers.[16] Indeed, the law is so chary of impelling pipeline companies into improvident service commitments that even the certificates of public convenience and necessity for new service issued upon application of the pipeline company are *permissive*, leaving to the final discretion of the pipeline company whether the authorized facilities will actually be installed and the authorized service actually initiated.[17] These features of the regulatory picture serve to protect the firm service of consumers from erosion, permitting sensible planning of investments and the avoidance of unnecessary industrial dislocation.

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[14] "The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of all the circumstances weighs against certification." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 17 (1961). (footnote omitted.)

[15] The relations between pipelines and their customers are based on individualized contracts. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 339 (1956).

[16] Section 7(a) of the Natural Gas Act, 15 U.S.C. § 717f(a).

[17] See *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 80 F.Supp. 27, 31 (E.D. Mich. 1948), *aff'd* 173 F.2d 784 (6th Cir. 1949); Davis, K. C., *Administrative Law Treatise* § 4.10, p. 269 (1958).

Once service is initated under Commission authorization, another safeguard for the customer becomes operative which prevents a pipeline company from dropping a customer no longer economically attractive. Service cannot be abandoned except upon application, due hearing and a finding that the public convenience and necessity permits it or gas supplies are so depleted that the continuation of service is unwarranted.[18] A partial reduction in service is as much an abandonment of service as a complete cut off of service.[19]

Congress decided to treat direct sales differently from wholesales in one important respect. Under Section 1(b) of the Act,[20] the Commission was denied any jurisdiction over the rates for direct sales. The reason was clear. Such sales are made under highly competitive conditions.[21] The pipeline company needs a maximum of flexibility in negotiating contract terms, as it might be competing with another supplier of natural gas or with a supplier of oil, coal or other form of energy, in negotiating with an industry. The industrial customer, on the other hand, must be certain that the pipeline company can and will live up to the bargain thus made, before it abandons its options to use alter-

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[18] Section 7(b) of the Act. 15 U.S.C. § 717f(b). This is the only provision in the Act which refers to the depletion of gas supplies. For an example of the careful analysis and detailed evidence required in an abandonment case, see *Cabot Gas Corporation*, 3 F.P.C. 75 (1942).

[19] A "reduction in the quantity of gas delivered or the installation of controls to permit such reduction is, if not an abandonment of a portion of the Pipe Line's facilities, certainly an abandonment of *any service* rendered by means of such facilities * * *." *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942, 945 (6th Cir. 1949).

[20] 15 U.S.C. § 717b.

[21] See Hearing on H.R. 11662, *supra* n. 12, at p. 17.

native energy sources and makes substantial investments in gas using facilities.

It is certainly reasonable to expect that the pipeline company will only commit itself to provide a direct customer with the kind of service the pipeline company can reasonably expect to provide over the life of the contract, and that the industry will seek the service it needs. As the contracts between United and Monsanto and Texas Gulf make clear, the parties negotiated *firm* service, with a reasonable curtailment provision, applicable in the event of a gas shortage, similiar to that then found in United's FPC Gas Tariff.[22]

United is quite unique in the large number of long-term firm contracts it has executed with its direct industrial customers. Indeed, United is the only one of the seven pipeline companies currently curtailing gas service which provides a large amount of such service.[23]

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[22] The curtailment provision in United's FPC Gas Tariff was essentially the same from 1954 to October 1971. See Appendix B hereto for the text.

[23] United is the only major interstate natural gas pipeline company with a large number of firm direct mainline customers among the seven pipeline companies curtailing service.

Pipeline Company	*Number of Firm Direct Mainline Customers*	*Firm Direct Mainline Sales as Percentage of Total Annual Sales*
Arkansas Louisiana Gas Co.	0	0
Natural Gas Pipeline Company	2	0.898%
Panhandle Eastern Pipe Line Co.	0	0
Texas Eastern Transmission Corp.	0	0
Transcontinental Gas Pipe Line Corp.	1	0.290%
Trunkline Gas Company	1	0.005%
United Gas Pipe Line Company	*237*	*37.445%*

Source: FPC Form No. 2 for year 1970, Gas Operating Revenues, Customers and Sales.

As the Commission has been granted jurisdiction under Section 1(b) over the transportation of gas in interstate commerce to the plant site, Sections 7(c) and 7(e) enable the Commission to determine whether the service to be provided a direct customer is required by the public convenience and necessity *in light of the terms and conditions of the negotiated sales contract.*[24] At that point the Commission is empowered to attach to the certificate authorization reasonable terms and conditions required by the public convenience and necessity. But once the certificates are issued and accepted and the service commenced, the Commission lacks continuing jurisdiction to add additional terms and conditions which would reduce the volumes of gas available to the industrial customer.[25] This does not mean that the pipeline company is without the ability to obtain Commission review of the wisdom of continuing such service. The pipeline company may seek and

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[24] The Commission has on occasion denied certificate authorization to pipelines seeking to transport gas for use by industries. See *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961). Consequently, pipeline companies are not free to grant priorities to direct industrial customers at the expense of domestic consumers. See *Panhandle Eastern Pipe Line Co.*, 7 F.P.C. 48, 63 (1948).

[25] Section 7 of the Natural Gas Act follows in general the legislative scheme of the Motor Carrier Act of 1935 governing certificates of public convenience and necessity. However, Section 7(e) carefully omits a clause in the Motor Carrier Act which gives the Interstate Commerce Commission *continuing* jurisdiction over motor carriers. The deleted text is italicized in the following quotation from 49 U.S.C. § 308(a): "* * * and there shall, at the time of issuance *and from time to time thereafter,* be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may require * * *." See Statement of FPC Commissioner Manly, Hearings on H.R. 5249 (the source of the present provisions of Section 7(e)), House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess., p. 20 (1941).

obtain authorization, *prospectively*, to abandon service under Section 7(b) of the Act.[26]

C. Sections 4(b), 5(a) and 16 of the Act Do Not Provide the Committee with Authority to Curtail Gas Service.

Section 4(b) relating to unduly preferential and discriminatory service is not a grant of power; it is a prohibition.[27] One must look to Section 5(a), as the Commission does, for the source of its powers to enforce the prohibition.[28]

In *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635 (1945), this Court held that the Commission's jurisdiction under Section 5(a) applies to contracts covering direct industrial sales. That case was concerned with an appeal from a Commission order setting rates for the jurisdictional sales of a pipeline company. In finding that it was not error for the

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[26] The abandonment provisions of the Act include both transportation and sale, as this Court has found in *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83, 91 (1966):

> "United was found 'able and willing . . . to perform the *service* . . .' for which it had volunteered. A certificate was accordingly issued and formally accepted by United. United now wishes to abandon the express service it agreed to perform * * * without a § 7(b) finding by the Commission 'that the present or future public convenience and necessity permit such abandonment.' This is precisely what the Act forbids." (footnote omitted)

[27] A similar distinction was made by this Court when referring to Section 4(d). *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 339 (1956).

[28] Section 4(e) provides that when a change is initiated by a filing by the pipeline company, the Commission is empowered to "make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective." Section 5(a) applies to proceedings initiated after a rate has become effective. It operates prospectively only.

Commission, in the exceptional circumstances of that case, to allocate to the interstate wholesale business all of the earnings from the entire business (including interruptible direct sales) in excess of 6½ percent return, this Court made it quite clear that it was not thereby recognizing that the Commission had any jurisdiction over the rates charged the direct customers in view of the prohibitions of Section 1(b). "Sec. 5(a) does not of course give the Commission authority to disregard the jurisdictional lines which Congress has drawn between interstate wholesale sales and direct industrial sales so as to level the profits between the two classes of business."[29]

Section 5(a) deliberately excludes "service" from the recital of the matters to which it relates. It refers only to "rate, charge or classification," and to "any rule, regulations, practice, or contract." Further support for the conclusion that Section 5(a) cannot serve as a proper vehicle for curtailing service to a direct customer is to be found in the fact that Congress excluded direct customers from the list of those entitled to bring about a hearing on complaint.[30]

When the Commission attempted to require a pipeline company to eliminate an undue discrimination prohibited by Section 4(b) by enlarging its deliveries, the Court of Appeals reversed on the ground that the action violated the proscriptions of Section 7(a) of the Act.[31]

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[29] 324 U.S. at 647.

[30] "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any state, municipality, state commission or gas distributing company * * *." 15 U.S.C. § 717d(a).

[31] *Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F.2d 675 (3d Cir. 1953).

Section 16 of the Act is an "administrative" provision. It may serve to supplement the exercise of power under Sections 4, 5 and 7, which "provide the Commission with its primary tools for regulating the natural gas industry."[32] It cannot provide authority missing from the Act.[33] Such provisions:

> "authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act."[34]

D. In an Industry in Which Long-Range Forward Supply-Demand Planning Is the Universal Practice, United Has Improvidently Violated the Trust It Owes Its Customers and Breached Its Contracts with Them.

The direct sales contracts of Monsanto and Texas Gulf contain the same order of priorities found in United's FPC Gas Tariff until November 1971 when United unilaterally changed the priorities specified in its Tariff in a minor regard.[35] The highest priority is given to domestic consumers. The second highest goes to electric generating stations to the extent they use gas to generate electricity to serve domestic consumers. All other consumers are to be curtailed pro rata.

United's Tariff and all of its direct sales contracts, so far as we are aware, utilize the expression "shortage

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[32] *City of Chicago* v. *FPC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 23, 740 issued December 2, 1971), slip op. p. 21.

[33] *Willmut Gas & Oil Co.* v. *FPC*, 294 F.2d 245, 249-250 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 975 (1962).

[34] *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967).

[35] See Appendix B, hereto. In November 1971, United placed the use of natural gas as a raw material in the second highest priority of use. This change provided raw material gas for Monsanto's plant.

of gas" in connection with curtailments of service. This provision does not cover the gas supply situation on United's system since United began to reduce deliveries to its firm customers in November 1970. United caused the gas shortage on its system by improvidently adding service when it lacked adequate gas supplies, and knew that it was short of gas. It was able to effect this by keeping the Commission ignorant of the true state of its gas supply capabilities.

United's difficulties did not arise out of a sudden and unforeseen emergency on its system caused by a national gas shortage. United, like all interstate gas pipelines, bases its operations on long-term planning. It could not be otherwise in view of the wasting nature of the asset being merchandised, the very large investments involved in constructing pipelines, and the need to gear financing, depreciation and marketing commitments to gas reserves.[36]

United had an abundance of time within which to bring its market commitments into line with its gas supplies. Its gas supply difficulties developed slowly, almost ponderously, and were forecasted in plenty of time for United to avoid dire consequences by declining to add new service. It chose instead to gamble; to use gas reserves needed to render existing firm service for the purpose of initiating new service. This may have improved United's current revenues, but at the price of accelerating the date when the gas reserves would be exhausted and unable to support the system's market obligations without curtailments.

When it came time to reveal publicly the profligacy of its policy, United ran to the Commission for help,

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[36] FPC Form No. 15, for example, requires gas supply data for a twenty-year period in the future. See 29 F.R. 4873 (1964), as amended 32 F.R. 3292 (1967), 35 F.R. 6960 (1970).

seeking to shield itself from accountability to its victimized customers behind a declaratory order of the Commission to the effect that what it had done was consistent with its direct contracts and Tariff. This merits a look at developments on United's system over the past several years.

In the 1960's United's reserve life index began to deteriorate markedly, declining from 20.78 in 1961 to 11.66 at the end of 1968.[37] During the same period its gas reserves dwindled from 26.5 trillion cubic feet (Tcf) to 17.8 Tcf. In other words, United knew for several years that its gas acquisition program was falling further and further behind its needs.

Since at least the early 1960's, United has prepared semi-annual demand-supply studies for the use of management. In the spring of 1968, these studies for the first time warned management that United was facing a gas supply deficiency which could occur on a design day during the ensuing winter (1968-1969). Similar semi-annual studies made in the fall of 1968, 1969 and 1970 confirmed that the gas supply deficiency was not being remedied, and was actually worsening rapidly. Meantime, the Federal Power Commission was being advised by United that it anticipated no gas shortage before 1974.

A comparison of what the secret studies showed with what the Commission was being told through United's

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[37] See Appendix C to this brief which contains a copy of Exhibit 6 submitted by United in the proceedings before the FPC in Docket No. RP71-29. This Exhibit and the others appended to this brief were introduced into the District Court proceedings in the *LP&L* case by FPC Counsel as Exhibits 4-6 "to show the status and scope and the extent of the proceedings before the Commission, rather than to establish the truth as to what is stated." (Joint Appendix in No. 71-2550, pp. 300-301). They constituted part of the record before the Court of Appeals.

annual reports to the Commission on FPC Form No. 15 can be seen in Appendix D hereto.[38]

United improvidently created the deficiency on its system and accelerated the depletion of its gas reserves.[39] Large additional sales to the pipeline companies, Texas Gas Transmission Corporation (100,000 Mcf per day) and Mississippi River Transmission Corporation (50,000 Mcf per day), initiated by United at high load factors in the fall of 1968, and additional service to Gulf Power Company (84,000 Mcf per day) from March through October 1969, dried up the gas available for storage during the summer of 1969.

United again enlarged its service in the fall of 1969, although it expected a major gas shortage within

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[38] Appendix D contains a copy of Exhibit 30 in the FPC proceedings which was introduced by FPC Counsel in the *LP&L* case. See n. 37, *supra*. Monsanto's attorneys discovered the secret studies, made them available to the Commission and to the public, and introduced them into evidence in the 1971 proceedings before the Commission in Dockets RP71-29, *et al.* Appendix D shows the deficits forecasted by the secret studies as early as 1968-1969 while the annual gas supply reports of United to the FPC on Form No. 15 showed no deficit before 1974. Ignorant of the misleading character of the data filed with it, the Commission authorized United in 1969 and 1970 to enlarge its service in reliance on the Form No. 15 reports.

[39] Appendix E contains a copy of Exhibit 45 in the FPC proceedings, introduced in the *LP&L* case. See n. 37, *supra*. Since the fall of 1969, when United now admits it first knew it was short of gas, United has added over 1,000,000 Mcf per day of additional firm service. Between the fall of 1968 when United's secret studies show it anticipated a gas deficit and the fall of 1969, United added another 385,000 Mcf per day of new firm service. United's admission of knowledge in 1969 of its gas shortage may be found at transcript page 117 of the FPC proceedings introduced in the *LP&L* case as part of Exhibits 7-17. See n. 37, *supra*.

ninety days.[40] In January 1970 United experienced its first actual gas supply deficiency.[41] It lasted but a few days, but the experience placed United on notice that it had reached the bottom of the barrel even during a warm winter. It also knew that its customers would hold it accountable.

Nonetheless, United continued to initiate additional service in 1970. In the summer of 1970 United's problems worsened. It could not fill its storage fields and it entered the 1970-1971 winter season with even a smaller inventory in storage than it had the prior November. Nonetheless, United did not hesitate to initiate additional service in the fall of 1970.

In November 1970, the month when it began to curtail gas service on its system on a continuous basis, United initiated the following enlarged firm service to three of its customers:[42]

Texas Gas Transmission Corporation	50,000 Mcfd
Mississippi River Transmission Corporation	51,721 Mcfd
Mid-Lousiana Gas Company	40,000 Mcfd

As it was already deficient, United could only provide this firm service by curtailing service to other firm customers including Monsanto and Texas Gulf.

Since commencing its curtailments on a continuous basis in November 1970, United has continued to en-

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[40] See Interoffice Memo dated November 11, 1969, stating that a 500,000 Mcf per day shortage was anticipated during the 1969-1970 winter, set out in Appendix F. This is a copy of Exhibit 61 in the FPC proceedings, introduced in the *LP&L* case. See n. 37, *supra*.

[41] See Appendix D hereto.

[42] See Appendix E hereto.

large service to some of its customers by curtailing firm service to its other customers. The Commission was made aware of this,[43] but has done nothing about it. The enlarged service has since been initiated, forcing a further deterioration in the firm service to Monsanto, Texas Gulf and other firm customers.

There was a time before World War II when pipeline companies dedicated specific gas reserves in specified fields to particular customers. In those days the customer could have its own geologists check on the state of the dedicated gas reserves from time to time and knew rather well the state of its energy supply situation. The customer knew that those dedicated reserves would not be syphoned off to serve another customer.

But when pipelines began to contract to sell gas from their general system reserves, the relationships changed significantly. The consumer contracting for a full-requirements firm gas supply became wholly dependent upon the good faith of the pipeline company. A trust relationship was created, one that is formed wherever one company has complete custody of gas reserves for the benefit of another.

> "Wherever the owner of an interest in oil and gas has a power with respect to another person's interest in oil and gas, the courts are quick to imply a duty in connection with the exercise of such power. Power begets

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[43] Appendix G hereto contains a copy of transcript page 4616 in the proceedings before the FPC (Docket Nos. RP71-29, RP71-120) on July 15, 1971, containing a tabulation prepared by United which shows that United intended to enlarge sales during the 1971-1972 winter by over 200,000 Mcf per day. Monsanto and Texas Gulf attempted, by their suits in District Court, to enjoin these added sales on the ground that they were unlawful under Section 7(a) of the Natural Gas Act, 15 U.S.C. § 717f(a).

> responsibilities and duties. A fiduciary principle becomes applicable. The person having the power is restricted in his conduct; he is not permitted to base his conduct exclusively on self-interest. He must give consideration to the effect of his conduct upon the interest owned by another with regard to which he has a power."[44]

United violated its trust. It should be held accountable for its actions through suits brought by its injured customers.

II

PRIVATE SUITS FOR DAMAGES AND INJUNCTION CAN BE "A MOST EFFECTIVE WEAPON" FOR ENFORCING THE NATURAL GAS ACT.

United's gas shortage came as no surprise to United. Its secret studies forecast the result. United could have forestalled the shortage by refusing to attach new or enlarged service. Or, if it chose the course of adding service "by taking it away from existing lawful customers,"[45] United had both the obligation and the time to file a petition with the Commission in accordance with the abandonment provisions of section 7(b) of the Natural Gas Act.[46] It chose, instead, to injure its customers without legal sanction.

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[44] Williams, H. R., "The Fiduciary Principle in the Law of Oil and Gas." *13th Oil & Gas Inst.* 201, 274 (S.W. Legal Fdn. 1962). Professor Williams of Columbia University Law School is co-author of Williams and Myers, *Oil and Gas Law* (1959).

[45] In *Granite City Steel Co.* v. *Federal Power Commission*, 115 U.S. App. D.C. 392, 320 F.2d 711, 713 (1963), the Court of Appeals construed section 7(a) of the Natural Gas Act, 15 U.S.C. § 717f(a): "The theory and purpose of the statutory restriction appear to be that persons desiring gas for the first time or desiring more gas should not get it by taking it away from existing lawful customers."

[46] 15 U.S.C. § 717f(b).

The primary purpose of the Natural Gas Act was to protect consumers from exploitation at the hands of natural-gas pipeline companies.[47] Protection of the pipeline company against suits by injured consumers arising from its violations of the Natural Gas Act, breach of trust and breach of contract would defeat this purpose as the Commission cannot grant reparations.[48]

The Commission's attempt to garner to itself total regulatory authority also ignores Section 22 of the Natural Gas Act.[49] This provision provides a supplemental means of enforcement at the behest of an injured person. The possibility of damage suits and injunctive relief represent "a most effective weapon" in the enforcement of obligations under the Act. To limit an injured consumer to the processes of a Commission which has already failed to provide the protection necessary to avoid injury is not an acceptable alternative. The "hurdles that the victim might face * * * might well prove insuperable to effective relief." *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 435 (1964).

In *Borak*, a private suit relying upon a provision of the Securities Exchange Act of 1934 similar to Section 22 of the Natural Gas Act, this Court emphasized the remedial nature of the provision:

> "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a fed-

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[47] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

[48] *Id.* at 618.

[49] 15 U.S.C. § 717u.

eral statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) * * *."[50]

III

THE DECISION OF THE COURT OF APPEALS AS TO JURISDICTION OVER UNITED'S GREEN SYSTEM SHOULD NOT BE DISTURBED, AT LEAST NOT AT THE PRESENT TIME OR FOR THE REASONS ASSERTED BY APPELLANTS.

This part of this brief is germane only to the interests of Texas Gulf and should be considered as its submission only.

Texas Gulf's Bully Camp Sulphur Mine is served from United's Green System East which the Court of Appeals found was not subject to the Commission's jurisdiction.[51] When United contracted in 1967 to supply Bully Camp with a firm gas supply, United considered that that part of its pipeline system was not subject to the Commission's jurisdiction.

The facts concerning these facilities, their gas sources, the pattern of gas flows and the markets being served were tried before the District Court. United presented as its witness Mr. J. H. Echterhoff, vice president in charge of transmission operations. The General Counsel of the Federal Power Commission actively participated in developing the testimony of this witness through direct examination.[52]

The decision of the Court of Appeals, based on this record, provides the customers on the Green System

[50] 377 U.S. at 433.

[51] Petition of United for Writs, p. 25a.

[52] Joint Appendix in 71-2550, pp. 292-300; see also testimony of Mr. Cassin, pp. 283-285.

with the stability of gas service they contracted for and which United promised to render. The Court has given that service the same sort of protection that jurisdictional service enjoys under Section 7(b) of the Natural Gas Act.[53] Under the circumstances, United must take the initiative and justify any degradation of the service not permitted by its contract.

United's motive in seeking Commission assertion of jurisdiction is transparent. It wishes to have this government agency break the firm contracts United executed so very recently, and to present its customers with the ultimatum of paying unregulated prices substantially higher than the contracts provide, or be cut off the line regardless of consequent injury to their plants.[54]

The Commission has accepted United's challenge. In Opinion No. 610, issued February 9, 1972,[55] the Commission found that it has jurisdiction over the Green System and declined to certificate service to any of the firm customers on the system, despite the fact that many had been customers long before any event occurred that allegedly vested the Commission with jurisdiction. At a stroke of the pen, United's firm customers found themselves deprived of the stable contract rights which had induced them to invest millions of dollars in new plants. They were reduced to the status of mere permittees, able to receive gas on an emergency basis for the time being, to be cut off should further hearings

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[53] 15 U.S.C. § 717f(b).

[54] This Court rebuffed an earlier attempt by United to raise prices higher than it had contracted for. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[55] *United Gas Pipe Line Co.*, FPC Docket No. CP 71-89; Petition of United for Writs, p. 91a.

demonstrate that the price contracted for by United is not fully compensatory.

This is not the protection of consumers from exploitation at the hands of natural gas companies contemplated by the Natural Gas Act.[56] What it amounts to is absolution from a pipeline company's responsibilities to its customers and protection of the company from its derelictions.

The service on the Green System should be "grandfathered," afforded the status interstate service received at the time the Natural Gas Act first became law,[57] if and when the Commission acquires jurisdiction. Meanwhile, Commission jurisdiction should be limited to transportation of gas in pipelines clearly carrying gas on to the interstate market.[58] The Green System East is not being used for this purpose.

CONCLUSION

In view of their pending suits and appeals, Monsanto and Texas Gulf respectfully urge that this Court take no action in these proceedings which can serve to shelter United from accountability to its customers for abuse of its fiduciary duties to preserve its gas supplies for the benefit of its firm customers, and for breach of contracts. Nor should this Court deny to lower federal courts the jurisdiction, whether under Section 22 of the Natural Gas Act or in diversity suits, to enjoin United from actions which are in violation of

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[56] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

[57] 15 U.S.C. §717f(c).

[58] See *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965).

law, or which involve irreparable injuries arising out of breach of trust or breach of contract.

Respectfully submitted,

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April 1972

APPENDIX A

Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*:

§ 717 NECESSITY OF REGULATION OF NATURAL-GAS COMPANIES

* * *

Section 1. (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717 (b)]

* * *

§ 717c RATES AND CHARGES: SCHEDULES: SUSPENSION OF NEW RATES

* * *

Section 4. (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

* * *

§ 717f EXTENSION OF FACILITIES: ABANDONMENT OF SERVICE

* * *

Section 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f(a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity

permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. §717f(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided,* however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certifi-

cate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. §717f(c)]

* * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. §717f(e)]

* * *

ADMINISTRATION POWERS OF COMMISSION; RULES, REGULATIONS AND ORDERS

Sec. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. §717o]

* * *

§ 717u JURISDICTION OF OFFENSES; ENFORCEMENT OF LIABILITIES AND DUTIES

Section 22. The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in [former] sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this act. [52 Stat. 833 (1938); 15 U.S.C. §717u]

APPENDIX B

Comparison of Curtailment Provisions of United's FPC Gas Tariff in Effect Until November 14, 1971 and United-Monsanto Contract

United Gas Pipe Line Company
FPC Gas Tariff
First Revised Volume No. 1
General Terms and Conditions
Original Sheet No. 71, First Revised Sheet No. 72

"12. IMPAIRMENT OF DELIVERIES

12.1 *Proration of Impaired Deliveries*—Seller delivers gas to (a) gas utilities, and pipeline companies which deliver gas to gas utilities, for resale to domestic and industrial consumers, (b) steam electric power plants for use in generating electricity which is sold to domestic consumers, and (c) industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its consumers, then, Seller may, without liability to Buyer, prorate its gas supply in the manner hereinafter set forth after first making allowance for all gas required by Seller for the operation of any of its facilities. The gas requirements of gas utilities, and pipe line companies delivering gas to gas utilities, which sell gas to domestic consumers (but only to the extent of gas required for resale to such domestic consumers) shall first be supplied by Seller. If Seller is unable to supply gas for all the requirements of such gas utilities and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then gas for such requirements shall be supplied ratably. In the event Seller is able to supply gas for all the requirements of such gas utilities, and pipe line companies delivering gas to gas utilities, for

resale to domestic consumers, then there shall next be supplied the gas requirements of steam electric power plants using gas for the generation of electricity which is sold to domestic consumers, whether such power plants purchase their requirements from Seller or from gas utilities or from pipe line companies, purchasing their requirements from Seller; and, if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. After the above requirements have been supplied, the remaining gas supply, if any, shall be prorated by Seller among its other customers, to the extent of gas sold by them to their other consumers. In the event of any shortage of gas as in this Section provided, Buyer shall discontinue service of gas to its consumers during the period of any such shortage to the extent which may be necessary consistent to the provisions hereof.

In certain instances, Seller supplies less than the full requirements of certain of its customers, and there may be times when Seller supplies less than the full requirements of Buyer hereunder and it is the intent of this Section that any priority granted hereunder shall run only to that part of the requirements of each ultimate consumer as is being currently supplied by gas furnished by Seller, directly or indirectly."

United-Monsanto Contract
Article IX

"IMPAIRMENT OF DELIVERIES

Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other contract consumers, including Buyer."

Exhibit No. 6
FPC Docket No. RP71-29
Witness: C. C. Barnett
Exhibit No. 6

APPENDIX C

UNITED GAS PIPE LINE COMPANY
SUMMARY OF RESERVES AT END OF EACH YEAR 1948-1969

(1)	(2)	(3)	(4)	(5)	(6)	(7)
	Gas Reserves - M^3cf					
		Less				
Year	Added	Withdrawals	Contracts Terminated	Balance	Life Index-Years Col 4÷Col 2	Pennzoil Producing Co. Included in (2) and (4) Withdrawals	Balance
1947				14,830			
1948	994	512		15,312	29.9		
1949	357	539		15,130	28.07		
1950	6,395	622		20,903	33.61	158,011	3,846,458
1951	2,049	727		22,225	30.57	191,763	3,676,641
1952	2,178	869		23,534	27.08	206,302	3,743,992
1953	1,348	1,050		23,832	22.70	231,761	3,584,372
1954	2,545	1,106		25,271	22.85	221,900	3,865,073
1955	679	1,165		24,785	21.27	218,033	3,855,357
1956	1,116	1,261		24,640	19.54	223,781	3,724,745
1957	2,276	1,274		25,642	20.13	208,860	3,618,086
1958	3,227	1,302		27,567	21.17	206,472	3,435,911
1959	1,376	1,353		27,890	20.61	188,454	2,700,056
1960	641	1,350		27,181	20.13	184,328	2,582,564
1961	592	1,275		26,498	20.78	145,780	2,538,182
1962	1,067	1,302		26,263	20.17	137,814	2,542,356
1963	597	1,389	29	25,442	18.32	140,735	2,273,691
1964	940	1,468	796	24,118	16.43	148,120	2,190,028
1965	99	1,325	1,593	21,299	16.07	141,177	2,121,590
1966	1,338	1,387	1,674	19,576	14.11	144,138	2,144,270
1967	1,737	1,453	361	19,497	13.42	149,850	2,088,288
1968	(81)	1,523	134	17,759	11.66	146,534	1,782,649
1969	4,848	1,655		20,952 (1)	12.66	168,399	1,581,915
Total 1948-1969	36,618	25,907	4,589				
1969				(5,442) (2)			
1969				15,510 (3)			

(1) United Gas Pipe Line Company, including Pennzoil Pipeline Company

(2) Transfer to Pennzoil Pipeline Company

(3) United Gas Pipe Line Company, after transfer of Pennzoil Pipeline Company

UNITED GAS PIPE LINE COMPANY

Comparison of anticipated gas deficiencies shown on Form No. 15 reports filed with the Federal Power Commission with anticipated deficits shown on contemporaneous "in-house" reports

(Volumes in Mcf)

Date of Report	Type of Report	Year of first anticipated deficit	Volume of anticipated deficit
May 1968	In-House study	1968-1969	70,010 daily
September 1968	" "	1968-1969	24,425 daily
October 1968	" "	1968-1969	90,777 daily
12/31/68	Form No. 15	1974	165,371,000 annual
May 1969	In-House study	1969-1970[1/]	367,390 daily
September 1969	" "	1969-1970[1/]	173,339 daily
January 6, 1970	" "	1969-1970[1/]	176,119 daily
12/31/69	Form No. 15	1974	69,367,000 annual
September 1970	In-House study	1970-1971[2/]	719,274 daily
November 1970	" "	1970-1971[2/]	697,260 daily
12/31/70	Form No. 15	---[3/]	----- annual[3/]

1/ United actually curtailed firm service on its system in January and February 1970.

2/ United began its current curtailment of firm service program on November 1, 1970.

3/ Not available, 3/15/71.

11a

APPENDIX D.
Exhibit No. 30

Docket No. RP71-29
Exhibit No. 30

APPENDIX E

Exhibit No. 45

Docket No. RP71-2
Exhibit No. 45

UNITED GAS PIPE LINE COMPANY

New and Additional Firm Service:

	Page
Initiated After November 1, 1969	1
Initiated Between May 1968 and October 31, 1969	2

UNITED GAS PIPE LINE COMPANY

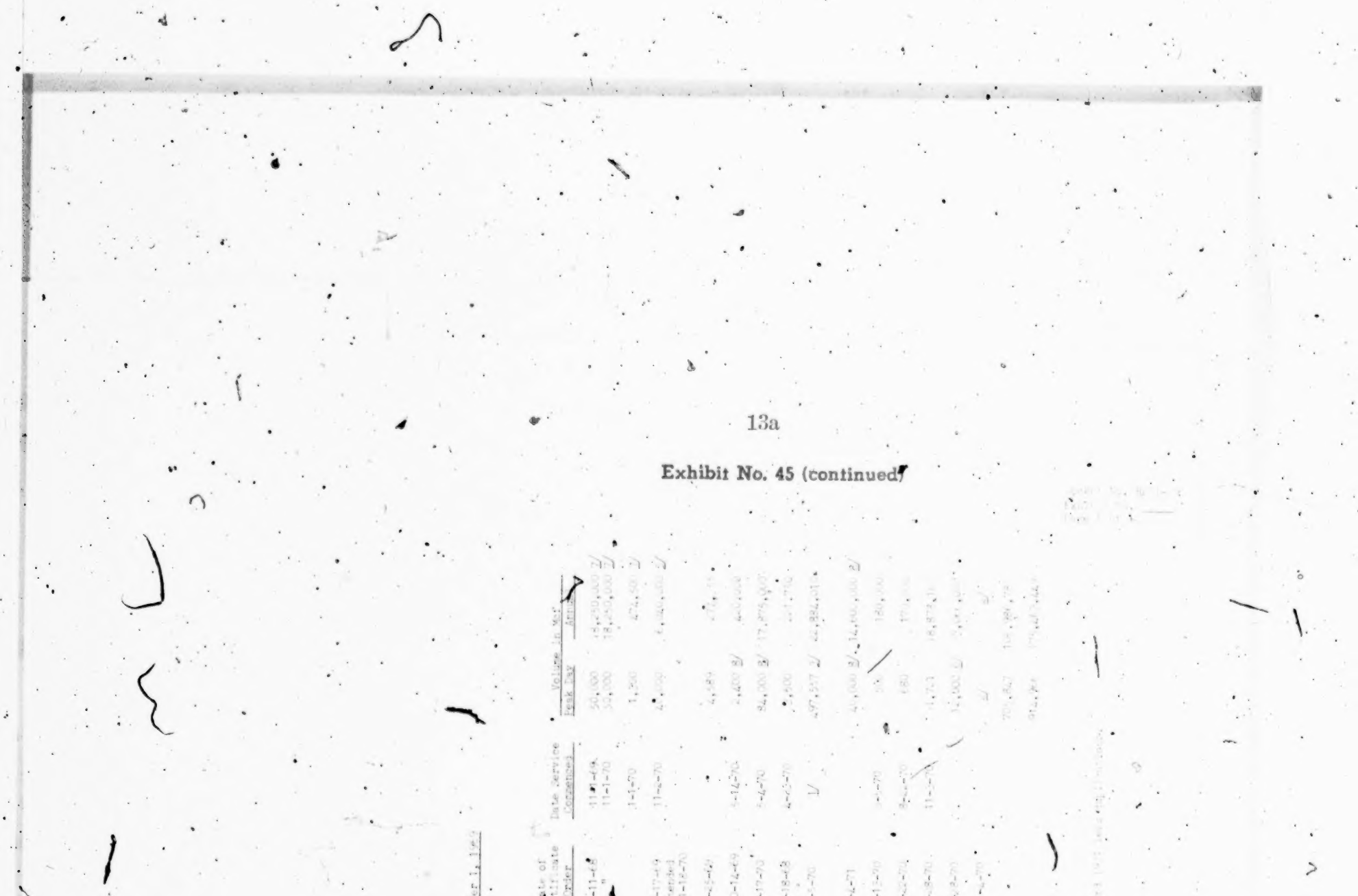
New and Additional Firm Service Initiated After Nove

(Mcf at 14.73 psia)

Customer	Location	Docket No.
Texas Gas Transmission Corporation	Monroe, La.	CP68-14
" " " "	" "	"
Stauffer Chemical Co.	LeMoyne, Ala.	G-13142
Mid-Louisiana Gas Co.	Fowler, La. or Baton Rouge, La.	CP70-341
Budget Application		CP70-43
Georgia-Pacific Corp.	Taylorville, Miss.	CP70-44
Gulf Power Co. - Crist Plant 4/	Near Pensacola, Fla.	CP70-109
City of Chireno, Texas	Chireno, Texas	CP68-199
Existing Distribution Companies & Direct Industrials	Shreveport, La. & Jackson, Miss. Divisions	CP70-148
Mid-Louisiana Gas Co.	So. Louisiana	CP71-141
Georgia-Pacific Corp.	Goss, Miss.	CP70-169
Louisiana Plywood Corp.	Wyatt, La.	CP70-225
Mississippi River Transmission Corp.	Near Monroe, La.	CP70-278
Escambia Chemical Corp.		CP70-297
Budget application		CP71-34
Total after November 1, 1968 (Total page 1)		
Total after May 1968 (Total pages 1 and 2)		

1/ Not furnished in record--construction commenced 9-11-70.
2/ Not available.
3/ Represents increase in market requirements for the Shreveport and Jackson Areas between 19
4/ March 1 through October 31 for years 1970 and 1971 only.
5/ 40,300 Mcf per day for 151 days. (Periods 11-2-69 to 3-31-70 & 11-1-70 to 3-31-71.)
6/ Only 6,000 Mcf included in totals.
7/ Based on 100% Load Factor.
8/ Not included in totals.

Exhibit No. 45 (continued)



UNITED GAS PIPE

New and Additional Firm Service Initiated

(Mcf at 14.7

Customer	Location
Courtalds North America, Inc.	Salco, Ala.
Cities Service Oil Co.	Lake Charles, La.
Mississippi Power Co.	Gulfport, Miss.
Texas Gas Transmission Corporation	Monroe, La.
City of Gary, Texas	Panola County, Tex.
Mississippi River Transmission Corp.	Monroe Field, La.
Prairie Aggregate Corp.	Wharton County, Tex.
Southland Oil Co.	Jasper County, Miss.
Humble Oil & Refining Co.	Iberia Parish, La.
City of Reklaw, Texas	
Budget application	
Total between May 1968 and October 31, 1969	

1/ Temporary authorization granted to begin deliveries.
2/ Based on 100% Load Factor.
3/ Effective date as shown on Ex. 15, page 4.
4/ Third year estimate.
5/ Fifth year estimate.
6/ Contract expires 9-1-72.

AR COMPANY

etween May 1968 and October 21, 1969

gsia)

Docket No.	Date of Certificate Order	Date Service Commenced	Volume in Mcf (peak day	Annual)
G-13140		6-1-69 1/	4,000	
"		6-1-69 1/		
		5-1-69 1/		
CP68-14	3-11-68	11-1-68		
CP68-104	1-23-68	1-1-68		
CP68-222	Final Order 4-24-69	11-1-68 1/		
CP68-277	4-4-68	4-17-68		
CP68-277	4-4-68	4-17-68		
CP68-300	4-26-68	7-1-68		
CP69-298	7-22-69	10-6-69		
CP69-38	10-21-68	"		
			209,119	68,476,669

Exhibit No. 45 (continued)

14a

Docket No. RP71-[illegible]
Exhibit No. ____
Page ___ of ___

APPENDIX F

Exhibit No. 61

INTEROFFICE CORRESPONDENCE
SHREVEPORT, LOUISIANA

November 11, 1969 Noted C.W.H.

Mr. John C. Nelson
Room 708
BUILDING

Dear Mr. Nelson:

In re: Gas Supply Situation
1969-70 Winter Heating Season

Yesterday and again today, meetings were held to discuss plans for curtailing customers during the 1969-70 heating season.

We are advised that we are faced with a shortage of approximately 500,000 Mcf per day total, distributed generally by three areas as follows:

Jackson and Mobile	150,000 Mcf
Houston-Beaumont Intrastate System (Pennzoil Pipeline Company)	110,000 Mcf
Shreveport and Monroe Area	240,000 Mcf

The Houston-Beaumont Intrastate shortage is predicated on no gas moving south from Goodrich and no gas being taken from Texas Eastern at Beaumont.

The estimated volume deficiency is based on the following mean temperatures in various cities:

Shreveport	20°
Beaumont	24°
Houston	24°
Jackson	20°
Lafayette	25°
New Orleans	32°

Exhibit No. 61 (continued)

Monroe	19°
Tyler	18°
Mobile	28°

Mr. Prudhomme mentioned that some curtailments will probably have to be made before these temperatures are reached.

As of today, we are taking approximately 109,000 Mcf per day out of Bistineau Storage, and during a recent cool spell withdrawals reached approximately 350,000 Mcf per day.

Three customers are now taking over their contract volumes as follows:

Pure Oil Company at Smiths Bluff Refinery
5,000 Mcf per day

Gulf Oil Company at Port Arthur
20,000 to 25,000 Mcf per day

International Paper Company at Mobile
6,000 to 8,000 Mcf per day

Consideration was given to requesting these three customers to cut back to contract, however, there was a question in the minds of the group as to whether or not we want to take this action with Gulf Oil. Additionally, it is Mr. Prudhomme's opinion that cutting back International Paper at Mobile will not help the Bistineau Storage situation. In all likelihood, we will have them cut back before too long.

As you know, the exactly correct operation of the Impairment of Deliveries provision in our contracts has not been precisely determined. One problem is that the Impairment of Deliveries provision in the direct industrial sales con-

Exhibit No. 61 (continued)

Tariff does not mention our sales to pipeline customers and does not assign them any order of priority. The Federal Power Commission Tariff at which our sales to pipeline customers and to FPC jurisdictional city gate customers does assign deliveries to the pipeline customers in order of priority.

Subject to this variation, it is the opinion of Mr. W. W. Brown that we have the right to curtail rateably as one group the following:

Direct industrial customers.

Pipeline customers to the extent of volumes sold by them to industrial customers and volumes sold by their distributors to industrial customers.

Power plants to the extent of the volumes generating electricity for their direct industrial customers.

Distributors to the extent of the volumes they sell to their industrial customers.

The requirements of distributors other than for their industrial sales definitely have top priority or first call for their requirements.

We have customarily curtailed our direct industrial customers first, then the pipeline customers, then our power plant customers and in rare instances at particular locations have requested our distributor customers to curtail their industrial customers.

Mr. Prudhomme states that generally when faced with a shortage of a large volume of gas, little is accomplished by curtailing direct industrial customers rateably and especially those taking less than about 5,000 Mcf per day. We make progress when we curtail power plant customers that can burn fuel oil or get the pipeline customers to reduce their takes from us.

Exhibit No. 61 (continued)

Mr. Prudhomme would like for us to give him a list of customers by areas that he can call on to cut back on some fairly uniform basis when a shortage begins to develop.

It must be borne in mind that if we curtail power plant customers to the extent of the full volume of their sales of electricity to industrial customers, and the fuel supply of those customers is also curtailed, the result may well be a widespread shutting-down of plants all over our system and a tremendous economic and political impact, not to mention that in the case of some power plants we are obligated to pay for substitute fuel. Some of the other power plants are not equipped to burn any appreciable volume of substitute fuel nor do they have it on hand.

It is my understanding that there will be a supply meeting here Friday and as I may not be here I am giving you this information in advance of the meeting. It seems to me that some policy decisions must be made outside of contract provisions before we can give Mr. Prudhomme the lists he would like to have to govern curtailments.

Sincerely,

Original Signed
V. S. BRENNAN
V. S. Brennan

VSB:vh

cc: Mr. W. W. Brown
Mr. J. B. Clopton
Mr. J. H. Echterhoff
Mr. H. W. Eiser, Jr.
Mr. R. U. Haslanger
Mr. C. W. Hollenshead
Mr. L. C. Poindexter
Mr. H. M. Prudhomme
Mr. G. A. Sanders

APPENDIX G

4616

U.G. Pl. Co.
Average Day Requirements
MMCF/DAY @ 14.73 Pcia

	Actual * January 1971	Actual ** January 1971	Estimated January 1972
Industrials	730	639	778
Power Plants	753	729	724
Pipe Lines	2114	2012	2129
City Gates	901	892	1110
Terrace Ry. Lock	—		110
Company use and unaccounted for	32	32	32
	4530	4304	4881

* Total requirements (including curtailed volumes).
** Demand supplied (without curtailed volumes).

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Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,
v.
LOUISIANA POWER & LIGHT CO., ET AL.,
Respondents.

No. 71-1040

UNITED GAS PIPE LINE CO. and
PENNZOIL UNITED, INC.,
Petitioners,
v.
LOUISIANA POWER & LIGHT CO., ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF HUMBLE OIL & REFINING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE HUMBLE OIL & REFINING COMPANY

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cept the last 3½ pages) to the question whether the Commission has power under the Natural Gas Act ("Act")[2] to implement curtailment procedures with regard to direct industrial customers served by an interstate pipeline company. Its argument pertains to a situation where the facilities and the operation of a company are subject to the Commission's jurisdiction, such as the Commission's power to control curtailment of service by United to LP&L's Sterlington Station from the admittedly jurisdictional portion of United's system. The Commission's extensive discussion of need for administrative expertise and national uniformity relates only to this question. As noted earlier, Humble takes no position on this aspect of the case.

Humble's brief is directed to the separate question whether the Court has primary jurisdiction, in private litigation, to determine whether a portion of United's facilities is subject to the Commission's jurisdiction when such decision is essential to the determination of an ultimate issue in the private suit. In making this subsidiary determination, the Court exercised the normal legal function of applying the Act to undisputed record facts. There was no need for special administrative competence or expertise.

United's Green System, which the Court below found is not subject to the Commission's jurisdiction (United App. A, pp. 22a-25a), is located entirely within the State of Louisiana (A. 233; R. 372).[3] Such System has always (until the issuance of Opinion No. 610) been considered by the Commission, by the Louisiana Public Service

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[2] Act of June 21, 1938, as amended, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, hereinafter cited only to code provisions.

[3] For the Court's convenience, there is attached hereto as Exhibit "A" the map which was introduced into evidence in the trial court (A. 155; 228-229; R. 252; 382) and in the Commission Docket No. CP71-89 (Exh. No. 1). This map geographically shows the location of United's Green System in Southern Louisiana.

Commission ("Louisiana PSC"), and the United States Courts[4] as well as by United, its suppliers and its customers, as a wholly intrastate or local transmission and distribution system, since the record shows that all of the gas in such System is produced,[5] transported, and consumed solely within the State of Louisiana (A. 168; 214; 223; 230; R. 275-276; 356; 372; 385). As Commissioner Carver noted in his dissent to Opinion No. 610 (United App. F, p. 127a, emphasis added):

> "For more than a decade, [United] has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. *No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit free of Federal regulatory impact and free to contract in any manner it chose, consistent with State law.*"[6]

Humble and other producers have for many years sold substantial volumes of gas to United on an intrastate

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[4] See, *e.g.*, United Gas Pipe Line Co., 30 F.P.C. 560, 561, *reh. denied*, 31 F.P.C. 1152 (1964), *aff'd.* La. Pub. Serv. Comm'n v. FPC, 359 F.2d 525, 527 (5th Cir. 1966) *cert. denied*, 385 U.S. 833 (1966) (hereinafter referred to as "*Florida Parishes*"); Louisiana Power & Light Co. v. United Gas Pipe Line Co., *et al.*, *supra*, p. 2 (United App. A, p. 24a, n. 15).

[5] Without authorization, United has from time to time introduced a minute volume of gas from the disputed zone of Federal-State domain into the Green System (T. 233).

[6] United's Green System-East, which lies south and east of its "Napoleonville-Koscuisko" interstate pipeline system, is that portion of the Green System which serves LP&L's Nine-Mile Point generating station.

basis,[7] which gas is delivered into the Green System (T. 408-412). Such gas is sold pursuant to contracts which provide, in effect, that it shall not be made subject to the Commission's jurisdiction (A. 168; 212-213; 217-218; R. 275; 354-355; 359-360; 363).

On October 1, 1970, United filed with the Commission an application pursuant to Section 7(c) of the Act, 15 U.S.C. § 717(c) (United App. D, pp. 48a-49a), requesting a certificate authorizing it to *continue* operating the Green System's facilities and to continue rendering the sales and services made by means of such facilities.[8] Notably, United filed its voluminous application only two weeks after the Secretary of the Commission wrote United inquiring whether it proposed to make any filing with the Commission in compliance with the holding of the Fifth Circuit in the *"Florida Parishes"* case, *supra*, note 4, page 5, (A. 150-151; R. 244-245), which had been finally decided four years earlier. Commissioner Carver's analysis of these events is particularly apt (United App. F, pp. 127a-128a):

> "Suddenly, in late 1970, United finds virtue in the privilege of being regulated and seeks to invoke our jurisdiction through this application. Why? United says *Florida Parishes* requires such action. I disagree, but even if that were the case, *Florida Parishes* was finally concluded in 1966 and four years is a long time for error to surface in this fashion.

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[7] At other locations Humble also sells substantial volumes of gas to United in interstate commerce.

[8] Public notice of United's application in Docket No. CP71-89 was given on October 15, 1970. However, it was not until after commencement of the court proceeding here under review that the Commission did set the certificate case for hearing on May 14, 1971. United was ordered to file its direct case by May 24, 1971, and cross-examination on the direct case commenced on June 7, 1971. Hearings concluded on June 18, 1971. The Commission waived the intermediate decision procedure, and final briefs were filed with the Commission by July 30, 1971.

Another explanation, less admirable but more plausible, lies in a combination of factual coincidences. United's Green System-East serves a heavy industrial load under long-term contracts reflecting the favorable rates that prevailed when gas supplies were plentiful and pipeline capacity needed markets (footnote omitted). But between 1962 and 1970, the ratio of reserves to production for the supplies the Green System could rely upon dropped from an ample 30:1 to a dangerously low 4.6:1 . . . . Hardly surprising, then, is the fact that within the same month that this application was filed, United also sought (and ultimately received) the assurance of this Commission that implementation of an approved curtailment plan 'would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts.' United Gas Pipe Line Company, —— FPC —— (Opinion No. 606, October 5, 1971).

"* * * My reservations [to Opinion No. 606] were well founded, as evidenced by the present effort to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands. The majority opinion concedes as much . . . .

United asserted in its application that the Green System had become subject to the Commission's jurisdiction because it had made unauthorized, uncertificated, and therefore unlawful interconnections between its interstate facilities (Exh. A, "Black System") and its intrastate facilities through which it had flowed small volumes of interstate gas into the Green System.

On March 31, 1971, one day before the effectiveness of United's curtailment plan and six weeks before the Commission set United's certificate application in Docket No. CP71-89 for hearing, but six years after the Com-

mission's decision in "*Florida Parishes*," which purportedly sparked United's filing, LP&L filed its private suit seeking to protect its vital gas supply (A. 3-11; R. 1-15).[2] In this regard, United introduced evidence pertaining to its certificate application before the Commission (A. 138; 151; R. 224; 246) and very carefully explained the theory of its case before the Commission (A. 151-157; R. 246-257). Five of United's officers and employees were examined by LP&L, United, and the Commission (A. 143; 177; 204; 219; 228; R. 232; 292; 340; 366; 381), with respect to: (1) the location of the Green System (A. 214; R. 276); (2) the type and volumes of gas flowed into the Green System, both in the past and prospectively, *i.e.*, interstate and intrastate (A. 172-173; 178-182; 230-232; R. 283-284; 294-300; 387-390); (3) United's contractual obligations to its intrastate producers (A. 168; R. 212-213; 217-218); (4) the nature of United's unauthorized operations of its interstate and intrastate facilities (A. 167; 221-225; R. 275-276; 375-376); and (5) United's motives in submitting its certificate application (A. 169-170; 176; R. 279-280; 288).

The Commission fully, actively, and voluntarily participated in the development of the record before the District Court in this private law suit. Represented by its General Counsel, it introduced evidence and cross-

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[2] The District Court issued a temporary restraining order on April 27, 1971 (A. 111-113; R. 181-183), which it subsequently dissolved on April 29, 1971, on motion of the Commission and United (A. 114-115; R. 186-188) on the grounds, *inter alia*, that the District Court lacked jurisdiction over the subject matter of the complaint (see, *e.g.*, A. 114-115; R. 184-188). LP&L appealed the District Court's dismissal, and the Court of Appeals for the Fifth Circuit (one judge) vacated the District Court's judgment and reinstated the temporary restraining order (A. 117; R. 189-190). This action was sustained by a panel of the Court (A. 119-121; R. 192-196), which remanded the case to the District Court "for an expedited hearing on the jurisdictional issue and on such other preliminary issues as may properly be raised" (A. 121; R. 196).

examined witnesses, with respect to United's Green System (A. 172-173; 178-180; 182; 217-218; 223-227; R. 283-285; 293-296; 301-302; 363-364; 375-380). It was upon this record that the Court below rendered its jurisdictional conclusion, *i.e.*, one developed at a trial court of competent jurisdiction by United, LP&L, and the Commission. In essence, when the Fifth Circuit determined the jurisdictional nature of the Green System, it performed the same function which it would perform upon review of a case arising out of a Commission proceeding.

As noted earlier, *supra*, note 1, page 2, on February 9, 1972, the Commission issued its Opinion No. 610 finding jurisdiction over, *inter alia*, United's Green System. That Opinion concluded, among other things, that the Green System is jurisdictional because such System had become integrated with United's interstate system by virtue of the gas flows into and out of the Green System (United App. F, p. 101a). But this jurisdictional predicate is contrary to the evidence. Indeed, according to Commissioner Carver (which was not denied by the majority), such Opinion seems very clearly to be based upon *ex parte* advice to the Commission by its Staff and can hardly be relied upon by this Court in concluding that the Fifth Circuit should have deferred to the Commission.[10] Commissioner Carver stated in dissenting to Opinion No. 610-A (Exh. B, pp. 154-55, emphasis in original):

> "A critical element of the jurisdictional finding is the conclusion that gas flows into *and out* of United's Green System-East and, at least on an annual basis, out of the State of Louisiana (Opinion No. 610, par. 37-38). The major producer applicants herein challenge this conclusion as not being supported by the record and erroneous in fact. My analysis, both

[10] Commissioner Carver's revelation, it should be emphasized, came after the Solicitor General's office filed its brief in this Court asserting that it believed the Commission's Opinion No. 610 was "correct."

prior to issuance of Opinion No. 610 and now, supports that position. An important principle has thus been raised and to allow the majority conclusion to go unchallenged is to acquiesce in the erosion of a fundamental concept of administrative jurisprudence.

"The majority opinion concedes at various places that it has gone beyond the actual record of this proceeding to reach its conclusions about relative volumes, peak day and annual flows, etc. (e.g., see par. 34, 35, and 41, and footnotes 4 and 5). The concept of "official notice" is a useful one and resort to it is unobjectionable when the document or other factual source is clear on its face. That is not the case here; the conclusions drawn by the majority are not self-evident from the exhibits or the noticed material themselves. In particular, any finding that gas flows *out of* the Green System-East can be derived only from an *interpretation* of flow diagrams and other technical data, involving a considerable element of expert judgment and opinion. But no witness has been presented to sponsor such an interpretation. Indeed, as to the majority conclusion (par. 38) that gas flows from the Green System-East out of Louisiana, the witness principally relied upon by the majority testified directly that all of the gas put into the Green System is consumed within the State of Louisiana (Tr. 323).

"Opinion No. 610 seems clearly to rely on advice received from the Commission's technical staff as to *interpretation* of record and noticed data on a vital point. As such, the advice received is *ex parte* in character and has not been exposed to cross-examination or rebuttal. So far as the record is concerned, therefore, the opinion is not supported by substantial evidence and should be set aside as not complying with the Administrative Procedure Act (Title 5, sec. 556(d), U.S. Code) (footnote omitted) and its judicial antecedents.

"Paragraph 4 of the present order amounts to a confession of weakness on this critical point. While

purporting to paraphrase or restate the relevant paragraphs of Opinion No. 610, it actually constitutes a substantial modification of a basic point. We are now told that gas which finds its way out of the Green System-East and transits the length of Green System-West to its juncture with Mid-Louisiana (point "U") *"appears"* to flow out of the state. This is indeed a flimsy predicate for an action having the drastic consequences referred to in my original dissent."

SUMMARY OF ARGUMENT.

A.

Reversal of the lower Court's decision holding that United's Green System is not jurisdictional will irreparably injure the stability, growth, and development of the natural gas industry. Such reversal would be tantamount to approval by this Court of United's unlawful activities.

The continued stability of the natural gas industry, of which the intrastate market is an extremely important element, depends upon the validity of binding and enforceable long-term contracts between producer and pipeline. If sanctity of contract is eroded away by permitting one party by willful and unilateral action to breach its contract, the foundation of the industry will be seriously endangered.

B.

The Court below properly declined to invoke the doctrine of primary jurisdiction in the circumstances of a private law suit for an injunction where vital gas supplies were at issue. This is especially true since the Commission voluntarily intervened in the private law suit and, through its General Counsel, actively participated in the development of the record on the jurisdictional question, which record contained all the essential juris-

dictional facts necessary for the resolution of the issue. Resolution of the issue merely involved the application of existing law to undisputed facts and did not require Commission expertise. The Commission's decision on the jurisdictional question, issued after the Court's decision, cannot serve as a basis for concluding that the lower Court should be reversed since such decision is based upon erroneous factual conclusions and apparently upon *ex parte* advice by the Commission's Staff. As such, it is patently unreliable.

C.

This case does not involve the doctrine of exhaustion of administrative remedies as alleged by petitioners. As a practical matter, LP&L had no available adequate administrative remedies to exhaust when it filed its injunction suit. It was neither an applicant nor a respondent in the Commission proceeding. The cases and facts upon which petitioners rely do not support the conclusion that United's certificate case raised a question of exhaustion of administrative remedies.

ARGUMENT

A. Reversal of the Lower Court's Decision Holding United's Green System Nonjurisdictional Will Have an Irreparable Adverse Impact Upon the Natural Gas Industry

The public interest dictates that laws be obeyed, regulations followed, and violations of law not be rewarded. The Commission's suggestion that application of the primary jurisdiction rule requires reversal of the lower Court's decision as to the nonjurisdictional nature of United's Green System involves not merely a procedural decision affecting the relationship between courts and administrative agencies. It would have a far-reaching substantive impact upon the natural gas industry. In order

for this Court to appreciate how reversal of the lower Court's decision will irreparably injure the stability, growth, and development of the natural gas industry, it is only necessary to understand what United has done with respect to the Green System. Reversal of the lower Court's decision by this Court would be tantamount to approval of United's unauthorized and unlawful activities.

United's Green System has been an intrastate system for nearly two decades. United has induced producers to sell gas to it on an intrastate basis by holding such System out to be nonjurisdictional. It has also been able to entice basic industry into its market area on the grounds that it would be able to serve such intrastate customers with a gas supply elicited on an intrastate basis. From time to time over the last several years United has leaked small volumes of interstate gas into the Green System through unauthorized, uncertificated, and therefore unlawful interconnections without notice to the Commission or United's intrastate suppliers. Subsequently, United found it necessary to advise the Commission of its unlawful activities, and the Commission utilized United's unlawful acts as the basis for asserting jurisdiction over the Green System. The Commission took such action despite the fact that the Louisiana PSC has, is, and will continue to regulate the Green System in the public interest on an intrastate basis, and despite the fact that United's acts result in a unilateral breach of contract with its producers such as Humble.[11]

[11] Humble would *emphasize* that it does not believe that its sales of gas, which gas is produced, transported, and consumed wholly within one state, are subject to the Commission's jurisdiction since such gas does not move in interstate commerce, see, *e.g.*, Peoples Natural Gas Co. v. Pub. Serv. Comm'n of Pa., 270 U.S. 550, 554 (1926); California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965); FPC v. Amerada Petroleum Corp., 379 U.S. 687 (1965). However, the Commission represented at the trial below that the "staff of the Federal Power Commission were concerned that those sales [by the

The intrastate market for natural gas in the United States is substantial and plays a vital role in our national economy. Located principally in the Nation's Southwestern states and in California, such intrastate markets serve substantial domestic and industrial customers with intrastate gas. Producers, such as Humble, play a vital role in supplying such intrastate gas because they explore for and develop gas for these particular markets. Consumer industries locate, make large capital outlays, develop the economy of the area, and become completely dependent upon intrastate systems, such as the Green System. Stated differently, basic industries have migrated into the market areas of intrastate pipelines relying upon adequate intrastate reserves to service such industries. Industries foster the development of human needs customers as well as the development of other service industries. Producers are induced to explore for and develop reserves on the assurance that they will have adequate intrastate markets. In this manner, the major intrastate markets in the Southwest have a natural-gas based economy, as distinguished from other sections of the country which can more easily rely upon other fuels, which economy is vital to the health of the national economy.

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producers] are jurisdictional sales" (A. 219; R. 363). Similarly, in Opinion No. 610, *supra*, p. 2, n. 1, the Commission stated that the "finding of jurisdiction over [*inter alia*, the Green System] raises the question of the regulatory impact on the producers who have made sales both before and after the unauthorized commingling of gas occurred on these systems" (United, App. F, p. 121a) and "permitted" the producers to file their contracts with the Commission (*ibid.*).

If Humble's sales of gas to United for delivery into the Green System were to become subject to the Commission's jurisdiction, Humble would be substantially damaged. For example, Humble sells gas to United under nine contracts. If such contracts were to be regulated on the basis of present area rates for the Southern Louisiana Area (on-shore), Humble could lose as much as $2,000,000 under such contracts for the period 1972-1976.

Reversal of the lower Court's decision would mean that there would no longer be any sanctity of contract between intrastate pipeline companies and their producers and customers. This is not a case dealing with the question of the Commission's jurisdiction resulting from enactment of a statute, see, *e.g.*, *J. M. Huber Corp.* v. *FPC*, 236 F.2d 550 (3rd Cir. 1956) *cert. denied*, 352 U.S. 971 (1957) or a properly filed application looking toward prospective certification under the orderly processes of law. We are dealing with a situation where one party has purposefully sought to make its system jurisdictional in violation of the Act and in violation of its contracts with its suppliers, to the detriment of such suppliers, its customers, and the area which its pipeline serves.

Producers, such as Humble, have the right, at the time they enter into their contracts, and before they commence service, to determine whether they will sell their gas to interstate or intrastate markets, see, *e.g.*, *Atlantic Refining Co.* v. *Pub. Serv. Comm'n of N. Y.*, 360 U.S. 378 (1959); *Pan American Petroleum Corp.* v. *FPC*, 339 F.2d 694, 696 (10th Cir. 1964) *rev'd on other grounds*, 381 U.S. 762 (1964); *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F.2d 404, 409 (10th Cir. 1959). There are many reasons a producer may chose one market over another. Certainly, price is an important element. Other elements in a producer's decision may involve rates-of-take, contract term, and price stability necessary for corporate planning.

Once the judgment has been made to enter into a contract to sell gas in intrastate commerce, producers, such as Humble, have the reasonable right to expect that their contracts will be respected by all concerned, *i.e.*, the right to the "realization of reasonable expectations that have been induced by the making of a promise. Doubtless, this is not the only purpose by which men have been

motivated in creating the law of contracts; but it is believed to be the main underlying purpose, . . ." *Corbin on Contracts*, Chap. 1, § 1 (1952). The viability of the Nation's natural gas industry is predicated upon the sanctity of long-term contracts such as Humble has entered into with United for the sale of gas into United's Green System. This Court has recognized that long-term supply contracts which are subject to the Commission's jurisdiction may not be unilaterally breached for private gain, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 337 (1956). Rather, the Act, by "preserving the integrity of contracts, . . . permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry," *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. at 344. As recently as April 6, 1972, the Commission itself, appears to have recognized the essential need to protect contractual rights and obligations of producers selling to pipeline companies. Thus, in a proposed rule designed to encourage exploration and development of new supplies, the Commission has laid the ground-work for certification of new producer sales at contract rates which will not be subject to revision by area rate or pipeline rate orders.[12] The result sought by United and the Commission here is at war with the Commission's own most recently expressed philosophy.

Humble's intrastate contracts with United span a period of two decades. Those contracts were entered into on an arm's-length basis in the reasonable expectation that they would be fully adhered to and respected by all interested parties, including United and the Commission. Such contracts have never been filed with the Commission, although the Commission knew, as a result of fre-

[12] "Notice of Proposed Rulemaking and Statement of Policy Relating to Optional Procedure for Certificating New Producer Sales of Natural Gas," Docket No. R-441 (issued April 6, 1972), —— F.P.C. ——.

quent audit and inspection of United's interstate system, that United's Green System had an independent and self-sufficient source of intrastate gas supply. Certainly, these contracts were not used as a device to evade federal jurisdiction, see, *e.g.*, *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965).

There is vital importance to valid, binding, and enforceable long-term contracts in the gas industry, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, *supra*, page 16. If sanctity of producer-pipeline intrastate contracts is destroyed, the underpinnings of the natural gas industry will be rapidly eroded. In making basic decisions whether to explore for new reserves, to drill properties, or to further develop existing reserves, a producer considers the economic facts of life. Its prospective cash flow from an interstate sale may be considerably less than from a sale which could be made to an intrastate market. A producer drills and develops gas reserves on one set of assumptions. If he could know that those assumptions would subsequently become invalid, he would not drill and develop reserves in the first instance, and would devote his capital to a more reliable investment.

Of course, the producer has many known risks which he is willing to undertake. For example, he may not find any hydrocarbons or the cost of finding and developing reserves may be considerably higher than anticipated. But reversal of the Court below would introduce a new risk, a risk that the contracting purchaser might, by its own unilateral, willfull act, substantially alter the effect of the agreement and thereby destroy the basis upon which the producing industry relies.

The effect of imposition of this new risk can be graphically illustrated by positing a situation where the seller, instead of the pipeline buyer, were to abrogate its contract. Could the pipeline and its customers tolerate a

condition where, after they had invested capital and become dependent upon certain supplies, the seller could, in violation of a regulatory statute, change the terms of the contract to suit its interest?

The intrastate and interstate markets are interdependent upon one another for supplies. In a real sense, the intrastate market is supportive of the interstate market. Thus, when incentive supplied by the intrastate market is successful in finding new reserves, much of that production finds its way into the interstate market. Successful drilling in an area stimulated by intrastate markets will stimulate further drilling in such area for the interstate market. Moreover, in these times of gas supply crisis, gas in the intrastate market has been sold on an emergency basis to the interstate market and has immeasurably helped such market.[13] Without the incentives of the intrastate market such help would not now be available for the interstate market.

Petitioners clothe their argument in terms of the doctrine controlling the relationship of courts and administrative bodies. But their argument that the lower Court should be reversed is in reality no more than a naked attempt to justify abrogation of private contractual relationships upon which the industry was formed.

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[13] See, *e.g.*, Order No. 402 in Docket No. R-386 "Policy with Respect to Sales and Deliveries of Natural Gas for Resale in Interstate Commerce, by Companies With Exemptions Under Section 1 (c) of the Natural Gas Act to Alleviate Temporary Emergencies" (issued May 6, 1970) —— F.P.C. ——; and Order No. 431 in Docket No. R-418 "Policy With Respect to Establishment of Measures to be Taken for the Protection of as Reliable and Adequate Service as Present Natural Gas Suppliers and Capacities Will Permit" (issued April 15, 1971) —— F.P.C. ——.

B. The Doctrine of Primary Jurisdiction Permits Court Decision Regarding Jurisdictional Status of United's Green System. The Court Acted Reasonably in the Circumstances in Correctly Deciding Such Question

The fundamental question presented by petitioners is whether the Court below was required, by the doctrine of primary jurisdiction, in the circumstances of this injunction proceeding, to refrain from deciding the *purely legal* question of whether United's Green System is jurisdictional under Section 1(b) of the Act, 15 U.S.C. § 717 (b) (United App. D, p. 43a). The answer to this question must be made in the context of the facts of this particular case, *i.e.*: (1) the Court below had before it a complete record relating to the essential operating characteristics of the pipeline facilities involved, developed in a private law suit in a trial court of competent jurisdiction; (2) the revelant jurisdictional facts were fully developed with the voluntary aid and participation of the Commission; (3) determination of the jurisdictional question was solely one of law involving the application of the Act and guiding precedent to the undisputed facts of record; (4) determination of the question did not require any Commission expertise, skill, or discretion; (5) the question did not involve any national policy considerations upon which the Commission should have the first opportunity to pass; and (6) the primary jurisdiction question was fully briefed and argued to the Court below by all parties to the proceeding, including the Commission. Humble respectfully submits that the Court below not only had the authority to decide such question, but also that it acted reasonably in the circumstances, and that its decision was correct.

This Court has often considered the doctrine of primary jurisdiction. The application of the doctrine requires the exercise of sound discretion by the court involved, having regard to the particular circumstances of each case. The "principal reason behind the doctrine is

recognition of the need for orderly and sensible coordination of the work of agencies and of courts" 3 Davis, *Administrative Law Treatise*, § 19.01. The "principal criterion in deciding whether the doctrine is applicable . . . usually is *judicial* appraisal of need, or lack of need for resort to administrative judgment," *id.* at § 19.09 (emphasis added).

In *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952), this Court reiterated the pertinent criteria to be applied in determining whether a court should invoke the doctrine of primary jurisdiction, when it stated:

> "*The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.* This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

The case at bar clearly did not raise "issues of fact not within the conventional experience of judges." Nor did it require the "exercise of administrative discretion." On the contrary, the question of jurisdiction presented to the Court below was solely one of law requiring the application of the Act and guiding precedent to the undisputed facts of record.

It is important to note that United characterized its filing in Docket No. CP71-89, as its "*Florida Parishes*" compliance case, *supra*, note 4, page 5. The Circuit below is the Circuit which decided "*Florida Parishes*" on appeal from the Commission's decision and specifically held that its decision in "*Florida Parishes*" was not applicable to the circumstances of the Green System. Moreover, the Fifth Circuit is fully familiar with the doctrine of primary jurisdiction as it applies to the Commission since it applied such doctrine in *J. M. Huber Corp.* v. *Denman*, 367 F.2d 104 (5th Cir. 1966), and referred a question of the Commission's jurisdiction over royalty payments to the Commission for its initial determination, because such question presented national policy considerations and there was no record before the Court on the jurisdictional question or existing criteria for the Court to employ.

The Commission voluntarily and actively participated in the proceedings below and aided in the development of the record on the jurisdictional question. The Commission voluntarily intervened, responded to the pleadings filed in the proceedings below, and moved to dismiss the injunction proceedings. The Commission participated fully in the cross-examination of United's witnesses on the flow of gas in the Green System, introduced evidence on the type of gas flowed into the Green System (*i.e.*, gas sold pursuant to certificates of public convenience and necessity) and introduced into evidence the "entire excerpts from the proceedings [before the Commission] in . . . the certificate" case at the time of the injunction suit. (A. 182; R. 300). In these circumstances, Petitioners are in no position to complain that the record before the Court was inadequate and, for that reason, reference should have been made to the record before the administrative body.

The record before the Fifth Circuit contained all of the facts necessary for the resolution of the jurisdictional

question. For example, the Court below had before it: (1) United's application and evidence in Docket No. CP71-89 (A. 151; R. 246); (2) the complete theory of United's case underlying its certificate filing (A. 154-157; R. 252-257); (3) all of the necessary facts with respect to the Green System, *e.g.*, that it is located wholly within the State of Louisiana and that all of the gas in such System is produced, transported, and consumed within the State of Louisiana and does not leave such State (A. 168; R. 275-276); and (4) the nature of United's operations with respect to the Green System and its interstate facilities, including the unauthorized interconnections (see, *e.g.*, A. 178-180; R. 294-296).

In these circumstances, reference to the Commission was rendered wholly unnecessary since no Commision expertise, skill, or discretion was required. Justice Frankfurter well summarized this rule of law and the precedent upon which it is founded in a different though analogous context dissenting in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 521 (1958):

> "Contrariwise, where a decision of a case depends on determination of a question of law as such, either because of explicit statutory outlawry of some specific conduct or by necessary implication of judicial power because not involving the exercise of administrative discretion or the need of uniform application of specialized competence, the doctrine of primary jurisdiction has no function, because there is no occasion to refer a matter to the administrative agency. Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (reaffirmed in United States v. Western Pacific R. Co., 352 U.S. 59, 69, 77 S.Ct. 161, 167, 1 L.Ed. 2d. 126); Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578; Civil Aeronautics Board v. Modern Air Transport, Inc., 2 Cir., 179 F.2d 622, 624-625; see Davis, Administrative Law, 666-668."

The Court below knew of the existence of the certificate proceedings pending before the Commission in Docket No. CP71-89 (United App. A, p. 4a). It stated, however, that it "must determine whether minor diversions of interstate gas have converted a wholly state-contained pipeline system to an interstate facility" (*id.* p. 2a). The Court below continued that "until recently, all of the gas delivered to [LP&L's Nine-Mile] station only traveled in a pipeline system, designated the 'Green System' which gathered and disposed of gas wholly within the confines of the State of Louisiana. However, in 1970, United chose to divert 2.6% of the gas supplied under its Nine-Mile Station contract into the Green System from its interstate system, designated the 'Black System'" (*id.* pp. 3a-4a). In this regard, the Court below stated that it was "particularly significant that this minor amount of interstate gas had been introduced *into* the Green system, and that no intrastate gas could flow *from* the Green system into the Black system because of the pressure differential between the systems" (*id.* p. 22a, emphasis in original). The Court thus held that these facts, among others, *supra*, page 22, did not render the Green System jurisdictional under the Act. It also concluded that neither the decision of the Fifth Circuit in *Florida Parishes supra*, note 4, page 5, nor the decisions of this Court in *California* v. *Lo-Vaca Gathering Co.* and *FPC* v. *Amerada Petroleum Corp.*, *supra*, note 11, page 13, were controlling since in all of those cases gas in the system involved was physically transported outside of the State. The Court concluded (United App. A, pp. 23a-25a, emphasis added):

> "In determining whether a particular gas delivery system is subject to federal regulation . . . [the] court must examine 'the anatomy of the pipeline system to discover the channel of constant flow' to see if, in fact, gas crosses a state line at any stage of its movement from well-head to ultimate consumption. If it does, it is interstate gas (citations omitted).

"The lower court held that this analysis of constant flow required agency expertise and that it should refuse to exercise its jurisdiction and require exhaustion of administrative remedies. *Without adopting any sweeping or dogmatic contrary rule for every imaginable case, we disagree in the case at bar. The solution to the legal problem here depends upon simple flow mechanics, which are demonstrated in this record by uncontradicted evidence. It requires no expertise to determine that the channel of constant flow, insofar as the gas passed through and consumed from the Green system is concerned, is essentially within the State of Louisiana.*

* * * *

". . . the flow of gas from the Black system into the Green system in the case at bar is occasional and irregular, as well as minimal. The Green system, as an entire and separate unit, is physically located in and functions entirely in Louisiana. Therefore, the undisputed facts show that the channel of constant flow is an intrastate and not an interstate channel. The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction (footnote omitted)."

The Court below correctly distinguished *Florida Parishes*, *supra*, note 4, page 5, *Lo-Vaca*, and *Amerada*, *supra*, note 11, page 13 (United App. A, pp. 23a-25a) since it recognized that there was no attempt here to clothe an interstate sale with an intrastate identity and that no gas in the Green intrastate system leaves the State of Louisiana once it enters such System. Further, the Green System has been regulated for many years in the public interest by the Louisiana PSC.

The Court's decision is neither more nor less of a legal determination than a reviewing court could make under Section 19(b) of the Act, 15 U.S.C. § 717r(b) (United App. D, pp. 52a-54a), which empowers a reviewing court to "affirm, modify, or set aside [a Com-

mission[] order." [11] The only difference is that in this case the jurisdictional conclusion that was reached was developed on a record before the trial court, which included United's application and evidence before the Commission and was developed with the assistance of the Commission.

The Court below did not arrogate to itself a purely administrative determination since the decision which the Court rendered did not require any expertise, skill, or discretion on the Commission's part. Thus, the Court did not make the administrative or policy determination as to whether or not the Green System is entitled to a certificate, a determination which clearly requires Commission expertise under Section 7 of the Act, 15 U.S.C. § 717f. The Court's action was not only eminently reasonable in the circumstances of an injunction proceeding but clearly comported with the rule of law that the doctrine of primary jurisdiction performs no office where, as here, the question involved is a legal one traditionally considered to be within the province of the appellate courts by the "necessary implication of judicial power," *Federal Maritime Board* v. *Isbrandtsen Co., supra*, page 22, 356 U.S. p. 521.

This Court's decision in *Port of Boston Marine Terminal Assn., et al.,* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) cited as controlling on the question of primary jurisdiction by Mobile Gas Service Corporation, *et al.*,[15] in the context of the curtailment question,

[11] It would appear that the courts are not precluded from passing upon the merits of legal questions which have not been passed upon by the agency involved where there is a record upon which a legal conclusion may be rendered and "persuasive reasons" exist for such action. Cf. Permian Basin Area Rate Cases, 390 U.S. 747, 823-824 (1968).

[15] See, *e.g.*, Mobile's brief at pages 12-19. Mobile contends, after reviewing the law on primary jurisdiction, that this Court's recent decision in Port of Boston, *supra*, "brings the entire line of clear, uneroded authority down to date . . .", on the question of primary jurisdiction, *id.* page 19.

is helpful to a resolution of the primary jurisdiction issue in the certificate case, although the sharp differences between *Port of Boston* and the jurisdictional issue involved here provide the basis for the different results reached. Unlike the certificate question here, in that case, the question presented was "whether a resolution of [a] dispute [between two private litigants] by the Federal Maritime Commission is binding" on one of those litigants in subsequent District Court litigation, 400 U.S. at 64. This Court held that such determination was binding.

There, the Port of Boston Marine Terminal Association ("PBMTA") was administering a tariff on file with and approved by the Federal Maritime Board ("FMB"). Without the prior approval of the FMB, the PBMTA shifted the incidence of the tariff from consignees of goods to carrier-vessels "whenever the failure to remove cargo resulted from a strike by longshoremen" 400 U.S. at 64. Certain vessels refused to pay the revised charges, and the PBMTA brought suit in a state court. Following removal to the United States District Court, the Court deferred action, pending a determination of the validity of the *change in tariff* by the FMB. The FMB found, *inter alia*, that its approval of the *tariff change* was unnecessary since it was contemplated in the tariff which PBMTA was administering.

In this Court, Rederiaktiebolaget Transatlantic argued that the District Court should not have invoked the doctrine of primary jurisdiction. This Court thought differently because the FMB was: (1) "primarily responsible for supervising . . . conferences of marine terminal operators," 400 U.S. at 68; (2) had previously approved the "very agreement that established the basic pattern of [PBMTA's] operation" which agreement was the "subject of the present dispute"; (3) the FMB had the expertise necessary to construe the agreement in "light of the

overall policies concerning terminal conferences"; and (4) most importantly, "*neither the Commission nor the government was a party*" to the District Court litigation, 400 U.S. at 69.

Thus, unlike the case at bar, this Court concluded that the District Court properly referred the issue to the FMB because it had no record on that issue, because the resolution of such issue required Commission expertise, and because the Commission was not a party to the proceeding. These are obviously decisional differences. Moreover, LP&L's complaint for injunction was not a collateral attack upon a Commission order because the Commission had not even set the case for hearing when LP&L filed its injunction suit and there was no Commission order to collaterally attack.

C. The Court Below Properly Exercised its Discretion in Declining to Invoke the Doctrine of Primary Jurisdiction

1. *The Certificate Proceeding Does Not Involve the Doctrine of Exhaustion of Administrative Remedies*

The Commission (FPC Br., pp. 7-8; 15; 35-38) and United (United Br., pp. 6-7; 19-24) base their claim that the Court below erred in deciding the jurisdictional status of United's Green System principally on the ground that the Fifth Circuit should have adhered to the doctrine of "exhaustion of administrative remedies." Humble disagrees with the premise that the mere existence of United's certificate application filing precluded court consideration of the jurisdictional issue in the circumstances of this private injunction proceeding. If the certificate case involved the doctrine of exhaustion of administrative remedies, as alleged by petitioners, this Court must inquire: "Were there any administrative remedies within LP&L's control which would have been adequate to enable LP&L to obtain an immediate Commission

determination as to whether the Green System was jurisdictional?" The urgent need of LP&L for a determination of this question was readily apparent when it is recalled that United had advised LP&L that its gas supply would be curtailed on April 1, 1971 (A. 7; R. 7).

The attached Exhibit "C" clearly shows that there were no adequate administrative remedies within LP&L's control to exhaust at the Commission at the time it filed its injunction suit against United. United's application was filed on October 1, 1970, but that application was not set for hearing by the Commission until eight months later, on May 14, 1971, and the Commission has not yet decided whether a certificate should be issued (United App. F, pp. 114a-121a). In the interim, on March 31, 1971, LP&L filed its suit for injunction seeking to restrain United from curtailing vital gas supplies at its Nine-Mile Point generating station. At any time prior to May 14, 1971, there were, as a practical matter, simply no adequate administrative remedies to exhaust.[16]

The mere filing of an application for a certificate of public convenience and necessity, in circumstances like the case at bar, is insufficient to invoke the doctrine of exhaustion of administrative remedies. LP&L simply had no control over United's application or the conduct of the hearing on United's application. Indeed, prior to May 14, 1971: (1) the Commission could have determined that United's application was deficient in several material respects and rejected such application pursuant to Section 157.8 of the Commission's Regulations Under the Natural

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[16] It is true, of course, that United's curtailment proceeding was underway in Docket No. CP71-29, *et al.*, when LP&L filed its injunction suit. Such curtailment proceeding covered jurisdictional sales and services as well as those which United asserted were jurisdictional. But the Commission specifically recognized in Opinion No. 606, issued in Docket No. RP71-29, *et al.*, that that case was not the proper forum for a determination of the jurisdictional status of the Green System (United App. E, p. 60a).

Gas Act, 18 C.F.R. § 157.8;[17] (2) United could have requested leave to withdraw such application pursuant to Section 1.11 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 1.11, since no hearing had been held or convened on March 31, 1971, or United could have amended such application to delete from it the Green System; (3) United could have severed its unauthorized interconnections thereby rendering its application moot; or (4) United could have recognized, assuming *arguendo* the Green System is jurisdictional, that the Green System, just like certain of its other facilities in Southern Louisiana, is exempt from Commission jurisdiction under Section 1(c) of the Act, 15 U.S.C. § 717 (c), since the Green System would meet all the requirements of that Section.

Moreover, while it is true that on May 14, 1971, the Commission did set the certificate case for hearing, nevertheless, on that date the Court below set the injunction proceeding for an "expedited hearing" (A. 119-121; R. 192-197), which hearing commenced on May 27, 1971 (A. 138; R. 223). At the reopened hearing in the District Court, which hearing was commenced and concluded before hearings had commenced in Docket No. CP71-89, the Commission intervened and voluntarily, actively, and fully participated in the development of the record on the jurisdictional issue. In these circumstances, the question of exhaustion of administrative remedies clearly

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[17] As noted earlier, *supra*, page 28, the Commission has not yet determined that the Green System should be certificated because United's application and evidence contained "certain deficiencies" with respect to markets, gas supply, engineering feasibility and economic feasibility (United App. F, pp. 114a-120a). The Commission admits that the evidence in the record is "insufficient to permit a determination of whether the certificate sought by United is required by the public convenience and necessity" (*id.* at 120a) and the Commission remanded the proceeding to the Presiding Examiner for receipt of additional evidence on this question (*ibid*).

became moot. The Commission's voluntary participation in this private law suit and its participation in the development of a record on the jurisdictional question, submitted such question to the jurisdiction of the Court below, and petitioners cannot now be heard to complain that the Court was without jurisdiction to render a judgment on such question as part of the injunction proceeding, simply because the Commission does not believe that such judgment was "correct" (see, *e.g.*, FPC Br., p. 35).[18]

Nor was this a case where LP&L attempted to "bypass an agency proceeding merely because [it claimed] that the agency lacks jurisdiction" (United Br., p. 19). When LP&L filed its suit for injunction there *did not exist* an active agency proceeding which could then determine the jurisdictional status of United's Green System in time to provide an adequate remedy to preserve its supplies by the April 1st deadline imposed by United.[19] United's application lay dormant for six months when LP&L's injunction suit was filed and was not resurrected for another two and one-half months until it went to hearing. Thus, LP&L did not depart an administrative proceeding midway and repair to the Court on an interlocutory basis.

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[18] The incorrectness of the Commission's jurisdictional conclusion in Opinion No. 610 is manifest when it is recalled that such jurisdictional conclusion is predicated upon erroneous facts and apparently upon *ex parte* advice (see, *e.g.*, *supra*, pp. 9-11).

[19] It is true, of course, as United asserts (United Br., p. 20) that LP&L had intervened in Docket No. CP71-89 on February 8, 1971, and was there contending that the Commission lacked jurisdiction over United's Green System. However, LP&L was not admitted as a "party" to that proceeding until May 14, 1971, when the case was set for hearing and the Commission permitted LP&L to intervene in such proceeding.

The Fifth Circuit's action must be viewed in the context of the proceedings then before it. The suit by LP&L was for an injunction—an extraordinary remedy. The application of United was purportedly a compliance filing submitted as a result of the "*Florida Parishes*" case finally decided by the Court below six years earlier. The Commission obviously had taken no energetic steps to determine whether compliance with "*Florida Parishes*" was necessary in the intervening years and it is noteworthy that even today the Commission has not decided whether a certificate should issue. Considering all these circumstances, the Court acted reasonably in exercising its discretionary power not to refer the jurisdiction question to the Commission.

2. *The Cases Which Petitioners Cite in Support of Their Position Are Inapposite to the Circumstances of This Case*

The principal cases which petitioners cite in support of their position that "questions relating to an agency's subject matter jurisdiction should be decided by the agency in the first instance" (FPC Br., pp. 15; 35-38; United Br., pp. 5-7; 19-22), *i.e.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962); *FPC* v. *Arkansas Power & Light Co.*, 330 U.S. 802 (1947), *rev'd mem.*, 156 F.2d 821 (D.C. Cir. 1946), which had reversed 64 F. Supp. 907 (D.C. D.C. 1945); and *McKart* v. *United States*, 395 U.S. 185 (1969), are fundamentally inapposite to the circumstances of this case for several reasons.

In the first place, one would be hard put to find an absolute rule of law requiring that *all* questions of agency jurisdiction be decided in the first instance by the agency. If there were such a rule, the doctrine of primary juris-

diction would be rendered meaningless as a judicial tool enabling a court to determine when an agency's expertise should be called into play. Secondly, the cases upon which petitioners rely deal with the doctrine of exhaustion of administrative remedies, which is not involved here, since this case involves the application of the doctrine of primary jurisdiction. Thirdly, such cases evidence this Court's profound concern that an agency's processes remain free from unwarranted and unreasonable interference by the Courts. In this case, however, LP&L did not attempt to enjoin the Commission from proceeding with the certificate case. Accordingly, there was no unwarranted interference with the Commission's processes by either LP&L or the Court below.[20] The Commission voluntarily participated in the lower Court proceedings and did not feel that such participation would jeopardize its standing to hold hearings on United's certificate application or from rendering its own judgment on the merits of such certificate application.

In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), Bethlehem Shipbuilding Corporation, Ltd., among others, brought suit to enjoin the National Labor Relations Board from proceeding with hearings on a complaint alleging unfair labor practices against Bethlehem. The District Court granted the injunctive relief requested without any record on the jurisdictional question and such determination was sustained on appeal. This Court stated that the "question for decision is whether a federal District Court has equity jurisdiction

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[20] United attempts to demonstrate how LP&L's injunction suit has interfered with the Commission's processes (United Br., pp. 21-22). Aside from the significant fact that the agency was not enjoined from conducting its hearings, the short and dispositive answer to this contention is that the Commission has issued its Opinion No. 610. Certainly, the Commission did not feel constrained from rushing to judgment with its jurisdictional conclusion as evidenced in its Opinion No. 610 (United App. F, pp. 121a-124a).

to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by the National Labor Relations Act . . .", 303 U.S., at 43, and held that the District Court was without power to so enjoin the Board, *id.* at 47. This Court protected the agency's processes from unwarranted interference by the District Court, especially in the circumstances where there did not exist a record of "undisputed facts" on the jurisdictional question. Here, as stated above, the Commission's processes have continued to function.

Similarly, in *Arkansas Power & Light Co.* v. *FPC*, 64 F.Supp. 907 (D.C.D.C. 1945), *rev'd*, 156 F.2d 821 (D.C. Cir. 1946) *rev'd mem.*, 330 U.S. 802 (1947), Arkansas Power & Light Co. ("AP&L") sought, *inter alia*, an injunction against the Commission from continuing with a proceeding involving AP&L. Here again, as in *Myers*, there was an unwarranted attempt to interfere with the agency's processes and no record developed on the jurisdictional issue.

Here, however, there was no unwarranted interference by the Court below with the Commission's processes, as there was in *Myers* and *Arkansas Power & Light Co.*, *supra*. In sharp contrast, as noted above, and as Commissioner Carver stated in his dissent to Opinion No. 610 (United App. F, pp. 130a-131a):

> ". . . this Commission was not an original party [to the case before the Fifth Circuit] but chose voluntarily to intervene for the purpose of arguing its primary jurisdiction (footnote omitted). Knowingly and purposefully, it submitted to the jurisdiction of the courts which have so far considered the matter. 'An administrative body which submits a legal question to a court of competent jurisdiction is bound by its judgment' *Otis & Co.* v. *SEC*, 176

F.2d 34 (CADC, 1948) (holding as summarized in Headnote 4)" [21]

This Court's decision in *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962), is also inapplicable to the circumstances of the case at bar. This case also involved a question of exhaustion of administrative remedies and required an expert finding as to what constitutes a labor organization. There, a state trial court had asserted jurisdiction over a labor

[21] Otis was reversed on other grounds by this Court in a memorandum opinion 338 U.S. 843 (1949) citing Myers, *supra*, page 31, as controlling. But this Court's reversal does not detract from the principle set forth in Commissioner Carver's dissent. There, the Securities and Exchange Commission ("SEC") sought enforcement of a subpoena in the United States District Court in connection with a "public investigation" it was conducting to determine whether Otis had violated the Securities and Exchange Act. Before the District Court had an opportunity to pass upon the merits of the enforcement application, the SEC instituted a separate investigation into Otis' activities, on the basis of the "public investigation," to determine whether Otis should be expelled or suspended from the National Association of Securities Dealers, Inc. Otis sought an injunction against this latter proceeding in the District Court pending a determination of the enforcement application, which injunctive relief was granted. Thereafter, the District Court denied enforcement of the subpoena on the grounds that the record in the "public investigation" did not make the requisite *prima facie* showing of fraud to pierce the attorney-client privilege. Otis again moved for an injunction prohibiting the SEC from proceeding with the separate investigation on the grounds that the District Court's conclusion was *res judicata* on the issue of fraud. The District Court dismissed the complaint and the United States Court of Appeals for the District of Columbia Circuit reversed on the grounds that the District Court's decision was *res judicata*.

Obviously, however, the lower court could not have enjoined the SEC from proceeding with an otherwise valid substantive investigation involving the same subject matter solely because the District Court denied enforcement of a subpoena. In those circumstances Otis had a duty to exhaust its administrative remedies. But it seems clear that the SEC could not have enforced its subpoena collaterally where the issue had been determined by the District Court. On this question the District Court's decision would have been *res judicata* because it was submitted to the Court and determined by the Court.

dispute which was arguably within the jurisdiction of the National Labor Relations Board and had enjoined the Marine Engineers Beneficial Association and its Local 101 from, *inter alia*, picketing the Interlake Steamship Co. The trial court's injunction was sustained by the Minnesota State Supreme Court which had determined that the labor organizations involved "were not 'labor organizations' within the meaning of § 8(b) of the Labor Management Relations Act, . . . and therefore not subject to the unfair labor practice provisions of that section of the statute," 370 U.S., at 174. This Court reversed and stated that "it has hardly been disputed, nor could it be, that the petitioners' conduct was of a kind arguably prohibited by § 8(b)(4)(A) of the Act and thus within the primary jurisdiction of the Board, if MEBA and Local 101 were 'labor organizations' within the contemplation of Section 8(b) generally (footnote omitted)," *id.* at 176-177.

This Court held that it could foresee "no reason to assume that the task of interpreting and applying the statutory definition of a 'labor organization' does not call for the same *adjudicatory expertise* that the Board must bring to bear when it determines the applicability of §§ 7 and 8 of the Act, to substantive conduct. *Indeed, analysis of the problem makes clear that the process of defining the term 'labor organization' is one which may often require the full range of Board competence*," *id.* at 178 (emphasis added). In this regard this Court alluded at various times to the "informed discretion" of the Board, *id.* at 178, note 6, the "policy considerations" which the Board must consider, *id.* at 181, and the necessity of the Board to be "free in the first instance to consider the whole spectrum of possible approaches to the question," *ibid.*, of what constitutes a "labor organization" under the Act. Moreover, as this Court noted, there was "persuasive evidence" that the petitioner was a labor organization within the scope of the relevant legislation and that the "state

court was shown not simply the arguable possibility of Labor Board jurisdiction over the controversy before it, but that the Board had *actually determined* the underlying issue upon which its jurisdiction depended, i.e., that MEBA was a 'labor organization' for purposes of Section 8(b) of the Act," *id.* at 184 (emphasis added).

The case at bar simply does not present comparable circumstances. Here, the jurisdictional question was solely one of law, which did not require agency expertise and which the Court had ample authority to decide.

The teaching of *McKart* v. *United States*, 395 U.S. 185 (1969) is helpful in these circumstances. *McKart* would see doctrines such as the exhaustion of administrative remedies read broadly and not circumscribed by artificial application. There, the United States brought suit against McKart for willfully and knowingly failing to report for induction into the armed services. At the trial, McKart defended by asserting that he should be exempt from military service on the basis of the "sole surviving son" exemption. The District Court held that such defense was unavailable because McKart had failed to raise this defense to his classification in the appellate processes employed by the Selective Service System. This Court reversed, holding that the doctrine of exhaustion of administrative remedies did not preclude raising this defense at the trial. Importantly, this Court noted that the "doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions (footnote omitted). Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved," 395 U.S. at 193. Although the holding of this Court appears to be narrowly confined to the administrative process involved in *McKart*, the broad teaching of that case is especially appropriate here, 395 U.S. at 197-199 (emphasis added):

"The question of whether petitioner is entitled to exemption as a sole surviving son is, as we have seen, solely one of statutory interpretation. The resolution of that issue does not require any particular expertise on the part of the appeal board; the proper interpretation is certainly not a matter of discretion (footnote omitted). In this sense, the issue is different from many Selective Service classification questions which do involve expertise or the exercise of discretion, both by the local boards and the appeal boards (footnote omitted). Petitioner's failure to take his claim through all available administrative appeals only deprived the Selective Service System of the opportunity of having its appellate boards resolve a question of statutory interpretation. *Since judicial review would not be significantly aided by an additional administrative decision of this sort, we cannot see any compelling reason why petitioner's failure to appeal should bar his only defense to a criminal prosecution* (footnote omitted). There is simply no overwhelming need for the court to have the agency finally resolve this question in the first instance, at least not where the administrative process is at an end and the registrant is faced with criminal prosecution (footnote omitted)."

This Court recognized that questions of law need not be passed upon in every instance by the agency involved where the question is one of statutory construction, requiring no agency expertise.

3. *The Facts Upon Which Petitioners Rely Do Not Support Their Position*

Both petitioners (FPC Br., pp. 36-38; United Br., p. 25) would have this Court *reverse* the lower Court's decision holding that United's Green System is not subject to the Commission's jurisdiction. However, the basis for their position, *i.e.*, issuance of Opinion No. 610, is without foundation since that Opinion is, as Commis-

sioner Carver charges, based upon erroneous facts and apparently upon *ex parte* advice. Certainly, the Solicitor General and this Court cannot rely upon that Opinion since it violates the Administrative Procedure Act, 5 U.S.C. § 556(d).[22]

In any event, one of the principal arguments petitioners put forth is that the "court below did not have before it all the evidence which had been before the Commission" (FPC Br., p. 38; United Br., p. 24, n. 19). Thus, it is argued that the record before the Commission on the jurisdictional question was more extensive than that before the Court below.[23] However, comparison of the two records clearly reveals that the same

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[22] As noted above, the Commission would have this Court "reverse" the Court below on rather unique terms, *i.e.*, the Commission does not believe the lower Court's decision is *correct* in light of the Commission's Opinion No. 610 and "proper review of [Opinion No. 610] can best be effected on the basis of the full administrative record. Accordingly, the decision of the court of appeals on this point should be reversed so that review of the Commission's decision may proceed in due course under Section 19(b)" of the Act (FPC Br. pp. 35-36).

Even assuming *arguendo* that this Court were to accept the Commission's argument as to exhaustion of administrative remedies, the proper course would be to set aside the lower Court's decision, not reversal, since, as the Commission argues, the record before this Court does not "afford an adequate basis for resolving the jurisdictional issue" (FPC Br., p. 15).

[23] Both petitioners point with emphasis to the size of the record before the Commission in Docket No. CP71-89, *i.e.*, "1,276 pages of transcript, 63 exhibits and 10 items by reference" (FPC Br., p. 38). The Commission and United imply that all of this evidence was on the "jurisdictional issue." But any such implication is demonstrably incorrect. The record before the Commission on the jurisdictional issue consisted of only approximately 350 pages of transcript which dealt not only with United's Green System but also with United's so-called "Purple System." The reason it is more extensive than the record before the District Court is because United's evidence was cross-examined by at least six parties including the Commission Staff. This is also true with respect to the exhibits and items by reference.

essential jurisdictional facts were before both the Court and the Commission. For example, both records demonstrate: (1) that United had flowed small volumes of gas from its interstate Black System into its intrastate Green System (compare United App. A, p. 22a and United App. F, pp. 101a and 102a); (2) the application and evidence filed by United in Docket No. CP71-89 (A. 151; R. 246) as well as the "entire excerpts from the proceedings in . . . the certificate" case at the time of the injunction suit (A. 182; R. 300); (3) the theory of United's certificate case and jurisdictional position (A. 151-158; R. 252-257); (4) when the unauthorized flows commenced (A. 157; R. 258); (5) that all of the gas introduced into the Green System is produced,[21] transported, and consumed in the State of Louisiana and does not leave the State of Louisiana (A. 168; R. 275-276); (6) that the Green System's facilities are located wholly within the State of Louisiana (A. 168; R. 275); (7) the type of gas introduced into the Green System, *i.e.*, interstate or intrastate (A. 173; R. 283-284); (8) the extent of United's unauthorized interconnections (A. 155; R. 253); (9) that gas cannot flow from the Green System into United's interstate facilities and that gas can only flow from the interstate facilities into the Green System by turning "valve or other regulating" devices (A. 180; R. 297); and (10) that United would be required to flow greater volumes of gas from its interstate facilities into the Green System in the future (A. 181-182; R. 299).

On these facts, the Court below stated that the Green System is located "entirely within the State of Louisiana" (United App., p. 22a) and that it is "particularly significant that this minor amount of interstate gas had

[21] The Commission's record shows that small volumes of gas from the disputed zone of Federal-State domain were occasionally introduced into the Green System.

been introduced *into* the Green System and that no intrastate gas could flow *from* the Green System into the Black System because of the pressure differential between the systems. Although a physical connection permits the Black to Green flow, *the two systems are otherwise entirely separate facilities*" (*ibid.*, emphasis added). This conclusion is supported by the evidence developed at the trial and is also consistent with the record developed before the Commission in Docket No. CP71-89.

It is upon these *essential jurisdictional facts* which were before both the Court and the Commission, that the Court concluded, on the basis of *"Florida Parishes," supra*, note 4, page 5, and other cases,[25] that the Green System was not jurisdictional.[26] There was simply no basic difference between the *essential jurisdictional facts* before the Court and the Commission.

The Commission found that substantial volumes of interstate gas would have to be flowed into the Green System in the future (United App. F, pp. 102a-103a). This factor was also a matter of record before the Court below but constitutes no ground for concluding that Commission jurisdiction over the Green System exists. If United will be required to flow substantial volumes of interstate gas into the Green System in the future, it should apply for a certificate and explain to the Commission and other interested parties precisely what transactions it will engage in which it believes will render the Green System jurisdictional.

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[25] California v. Lo-Vaca Gathering Co. and FPC v. Amerada Petroleum Corp., *supra*, note 11, page 13.

[26] The Commission's conclusion in Opinion No. 610 (United App. F, pp. 104a-106a) that gas flows outside of the State of Louisiana from the Green System is directly contrary to the evidence developed through United's witnesses in both the trial court and the hearings in Docket No. CP71-89, as pointed out by Commissioner Carver, and not denied by the majority, in Opinion No. 610-A, Exhibit B, page 55.

Moreover, the Court below did not ignore this fact as United asserts (United Br., p. 24). Under the holding below the volume of gas introduced into the Green System is not decisionally significant since the "channel of constant flow" is the relevant criterion.

United asserts that the "jurisdictional result in the certificate case depends on a complicated factual analysis of interstate gas flows into and out of the New Orleans District and on the application of the commingling doctrine (citations omitted)" (United Br., p. 23). This argument is simply not sustainable. There are no complicated gas flows on the Green System. The gas enters United's Green System at one end of such System and travels in only *one* direction, *i.e.*, from southeast to northwest, until it is consumed within the Green System. No gas in the Green System leaves such System for destiny outside of the State of Louisiana. Moreover, the application of the commingling doctrine is a legal chore which the United States Appellate Courts are eminently well qualified to undertake.*

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* United asserts in this connection that the record before the Fifth Circuit was for the "limited purpose of showing the nature of the issue being considered by the FPC (citations omitted)" (United Br., p. 24). But this argument is unavailing. The important point is that a record reflecting the essential operating characteristics of the pipeline facilities involved was before the Fifth Circuit for review.

Finally, United implies that the Court below followed the wrong legal theory in concluding that the Green System is nonjurisdictional (United Br., p. 24, n. 20). Thus, United asserts that the Court below adopted the "*de minimis* concept discredited by this Court . . ." (*ibid.*), see, *e.g.*, *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515 (1945) and *FPC* v. *Florida Power & Light Co.*, —— U.S. ——, No. 70-38 (January 12, 1972). However, it does not appear from the lower Court's opinion that the Court below relied exclusively, if at all, upon this concept in arriving at its jurisdictional conclusion. Rather, the Court below determined that the "channel of constant flow" of the gas produced, transported, and consumed in the Green System did not make such System jurisdictional because such "channel of constant flow is an intrastate and not an interstate channel" (United App. A, p. 25a).

4. Section 19(b) of the Act Does Not Preclude an Appellate Court from Deciding a Purely Legal Question on Undisputed Facts

United asserts that "under normal circumstances a court must not only give an agency the opportunity to make the initial determination of agency jurisdiction, but must also permit that jurisdictional determination to be reviewed pursuant to the statutory review procedures rather than in a collateral suit" (United Br., p. 23). This argument completely misses the mark. There is no doubt that Commission orders should be reviewed only by the statutory review procedure prescribed by Section 19(b) of the Act, 15 U.S.C. § 717r(b) (United App. F, pp. 52a-54a), and should not be reviewed collaterally in the United States District Courts or in the state courts. That is the purpose of Section 19(b) which provides in pertinent part that any "party to a proceeding under this chapter aggrieved by an *order issued by the Commission* . . . may obtain a review of such order in the court of appeals of the United States

. . ." (*ibid.*, emphasis added).[28] But, Section 19(b) does not preclude the United States Appellate Courts from deciding purely legal questions on facts developed in a trial court of competent jurisdiction. Unlike the cases which United cites, there was no Commission order here involved when LP&L filed its suit for injunction, and Section 19(b) of the Act was simply not applicable at that time.

[28] Certainly, the cases which United cites, *e.g.*, City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958); Colorado Interstate Gas Co. v. FPC, 209 F.2d 717 (10th Cir. 1953) *rev'd on other grounds*, 348 U.S. 492 (1955); Algonquin Gas Transmission Co. v. Gregory, 105 F. Supp. 64 (D. Conn. 1952); Whitney National Bank in Jefferson Park v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965) stand for the proposition that an agency order should properly be reviewed only by the method prescribed by the statute involved.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should sustain the lower Court's determination that it had the authority to decide, and did correctly decide, the jurisdictional status of United's Green System.

Respectfully submitted,

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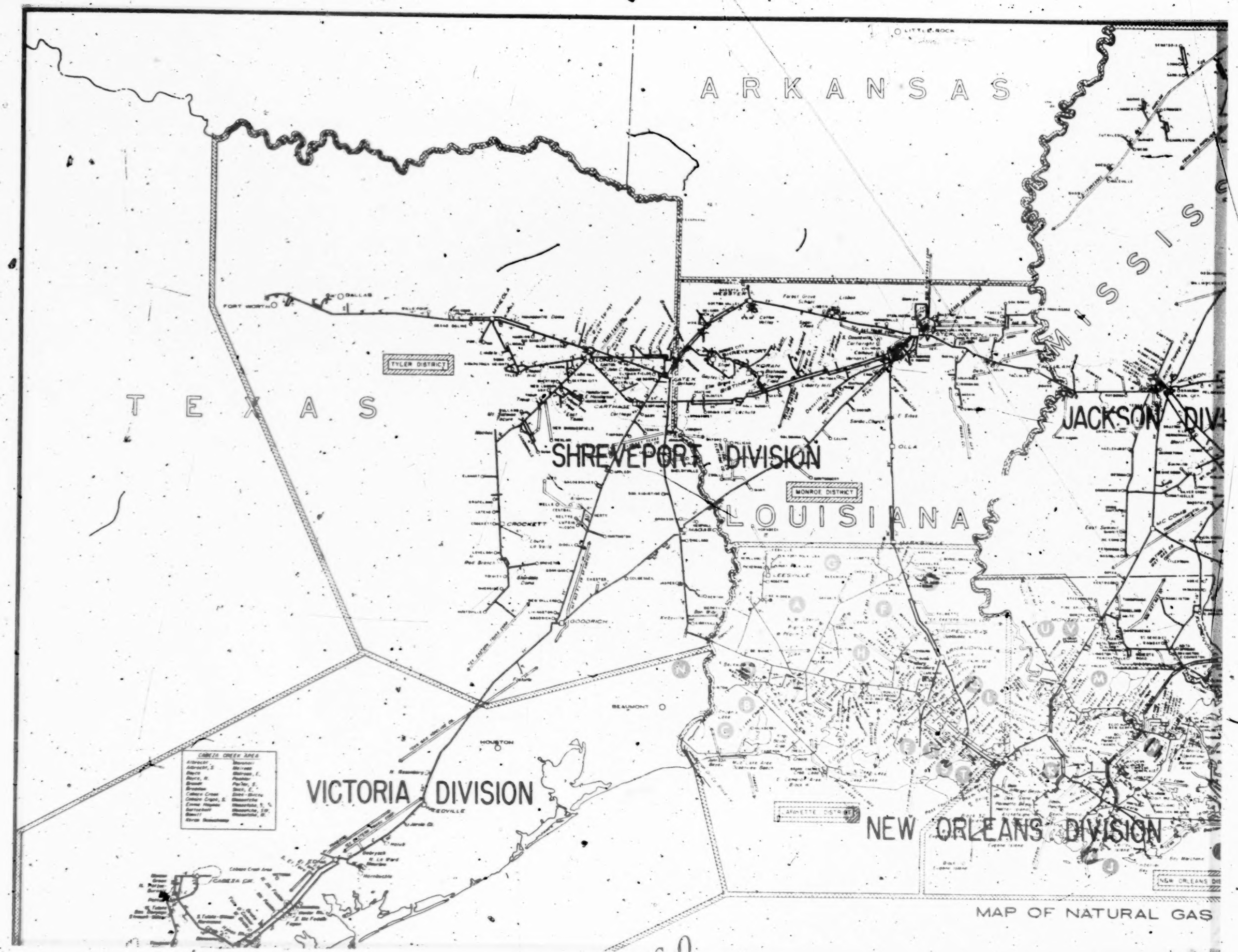
Attorneys for Humble Oil & Refining Company

By /s/ Sherman S. Poland
SHERMAN S. POLAND

Dated at Washington, D. C.
this 12th day of April, 1972


ARKANSAS
LITTLE ROCK
DALLAS
FORT WORTH
TEXAS
TYLER DISTRICT
SHREVEPORT DIVISION
MONROE DISTRICT
LOUISIANA
JACKSON DIVI
CROCKETT
GOODRICH
BEAUMONT
HOUSTON
VICTORIA DIVISION
CABEZA CREEK AREA
LAFAYETTE DISTRICT
NEW ORLEANS DIVISION
MAP OF NATURAL GAS

FPC DOCKET No. CP 71-
EXHIBT F

EXHIBIT A

ARKANSAS

MISSISSIPPI

ALABAMA

LOUISIANA

SHREVEPORT DIVISION

JACKSON DIVISION

NEW ORLEANS DIVISION

MONROE DISTRICT

LAFAYETTE DISTRICT

NEW ORLEANS DISTRICT

LITTLE ROCK

STERLINGTON

SHREVEPORT

KORAN

CARTHAGE

CROCKETT

GOODRICH

OLLA

BEAUMONT

MERIDIAN

MONTGOMERY

MOBILE

MAP OF NATURAL GAS PROPERTIES OWNED AND OPERATED

BY

FPC DOCKET No. CP 71-
EXHIBIT F

EXHIBIT A

ARKANSAS

MISSISSIPPI

ALABAMA

SHREVEPORT DIVISION

JACKSON DIVISION

LOUISIANA

FLA.

SION

NEW ORLEANS DIVISION

MAP OF NATURAL GAS PROPERTIES OWNED AND OPERATED

BY

GULF OF MEXICO
MAP OF NATURAL GAS
UNITED GAS
JURISD

NEW ORLEANS DISTRICT

EXICO

MAP OF NATURAL GAS PROPERTIES OWNED AND OPERATED BY

UNITED GAS PIPE LINE COMPANY

SHOWING

JURISDICTIONAL STATUS

LEGEND

PIPE LINES OWNED BY UNITED GAS
PIPE LINES OWNED BY OTHERS
MAIN LINE INTERCONNECTION WITH OTHER COMPANY

COMMUNITIES SERVED
MAJOR INDUSTRIAL DELIVERY
GOVERNMENT INSTALLATION
COMPRESSOR STATION
GASOLINE EXTRACTION PLANT
FIELDS SUPPLYING PIPE LINES
PROPANE AIR-PEAK SHAVING PLANT
DISTRICT BOUNDARIES
DISTRICT AND DIVISION BOUNDARIES

GRAPHIC SCALE

25 0 25 50 75 100

MILES

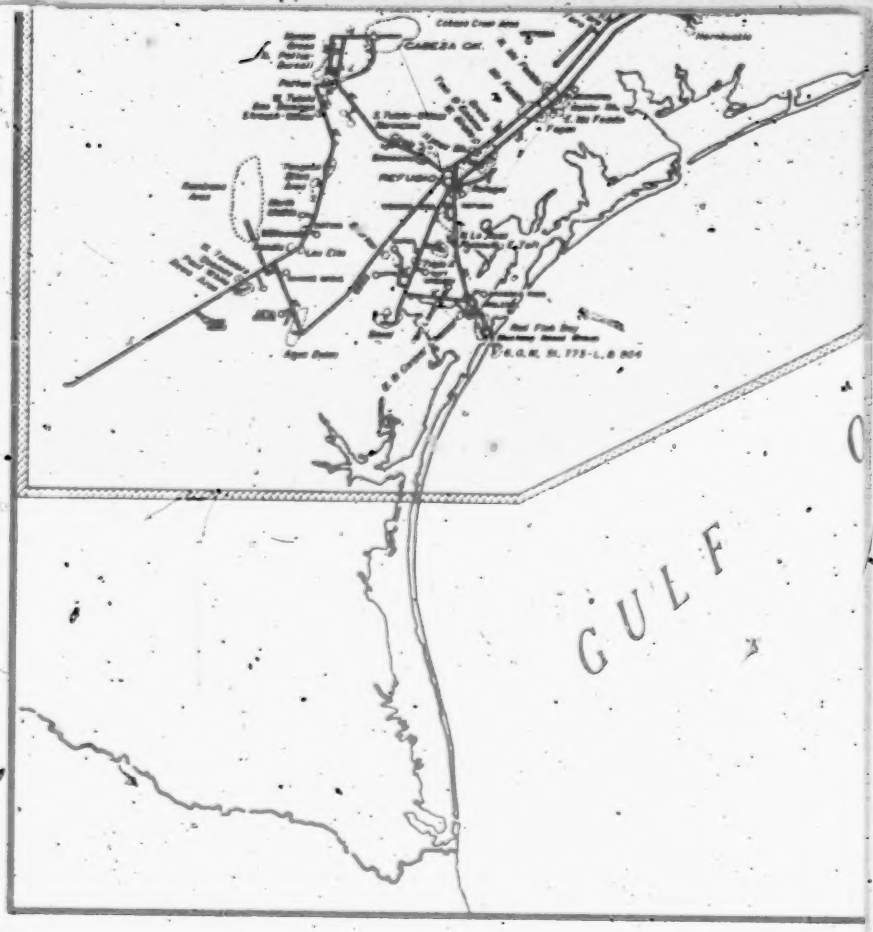

GULF

EXHIBIT B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 610-A

Docket No. CP71-89

UNITED GAS PIPE LINE COMPANY

OPINION AND ORDER DENYING APPLICATIONS FOR REHEARING, PETITION FOR AN INVESTIGATION AND MOTION FOR STAY

Issued: April 7, 1972

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

Opinion No. 610-A

Docket No. CP71-89

UNITED GAS PIPE LINE COMPANY

OPINION AND ORDER DENYING APPLICATIONS FOR REHEARING, PETITION FOR AN INVESTIGATION AND MOTION FOR STAY

(Issued April 7, 1972)

NASSIKAS, Chairman:

1. A number of parties [1] have filed applications for rehearing of the Commission's Opinion No. 610 and order, issued February 9, 1972, wherein we found that this Commission has jurisdiction under the Natural Gas Act over the facilities, transportation and sales for resale of natural gas by United Gas Pipe Line Company (United) by means of and from its interstate facilities within United's Victoria and New Orleans Divisions in the States of Texas and Louisiana, respectively.

[1] New Orleans Public Service Inc. and the City of New Orleans (jointly), Texas Gulf Sulphur Company, Boise Southern Company, Texas Gas Transmission Corporation, Louisiana Gas Service Company, Louisiana Power and Light Company, Gulf States Utilities Company, Cities Service Oil Company, Shell Oil Company, Humble Oil & Refining Company, Texaco Inc., and State of Louisiana, Louisiana Municipal Association, Parish of Cameron and Louisiana Public Service Commission (jointly).

2. Additionally, the State of Louisiana and the Louisiana Public Service Commission request an investigation of alleged violations of "the Natural Gas Act and of Gas Reserves" and move to stay Opinion No. 610 and the remanded proceedings.

3. The applications for rehearing challenge the Commission's assertion of jurisdiction on various grounds, all of which have been considered and treated by the Commission in Opinion No. 610. We do not believe that further discussion is necessary. There have been certain allegations of erroneous factual conclusions, however, to which further comment would be appropriate.

4. Several parties, whose arguments are directed to the Green System-East, contend the Commission erroneously concluded that gas from the Green System-East leaves the State of Louisiana. They argue that there is nothing in the record to show that gas actually flows out of the state and that annual flow diagrams filed as a part of FPC Form 2 actually show flows at point "U" going to Baton Rouge. At paragraphs 37 and 38 of the Opinion, we stated that gas from the Green System-East enters the Green System-West, flows into the interstate pipeline of the Mid-Louisiana Gas Company at point "U" and thereafter appears to flow out of the state. In noting the flows of gas into Mid-Louisiana Gas Company's interstate pipeline it was not our purpose to trace the flows of particular molecules of gas to any given point, but merely to recognize that gas originating in the Green System-East is ultimately commingled with interstate flows.

5. Texaco Inc., asserts that there is an error in paragraph 25 of the Opinion wherein the Commission described gas flows from the De Large Field. It contends that the Commission erred in concluding that gas entered the Green System-East from the De Large Field. The Commission does not so state in paragraph 25, nor is such a conclusion intended. Despite the fact that the

De Large field gas does not enter the Green System-East, interstate gas including deliveries from the De Large Field is used to serve the Dulac area. Texaco Inc. also notes that the Commission's opinion omits the fact that several small isolated sections of transmission facilities in the Green System-East do not receive commingled flows. This has no bearing on the Commission's general assertion of jurisdiction over the New Orleans Division and is a matter which will be considered at the time that particular facilities are before us for certification.

6. Boise Southern Company (Boise) alleges that Opinion No. 610 contains a substantial misstatement of fact relating to those facilities by means of which it receives its gas deliveries. It notes that, contrary to the Commission's statement in paragraph 12 of the Opinion, the interconnection at point "A" has been certificated by the Commission [2] as was a 12-inch line which interconnected with Texas Eastern's 30-inch line. The only other transmission line used to serve Boise is 6.1 miles of 8-inch line. Boise argues that any assertion of jurisdiction over the 8-inch line should have been made at the time of certification in Docket No. CP67-26, and that in the absence thereof it had the right to understand that no further authorization from the Commission would be required. A review of the Commission's order in Docket No. CP67-26 indicates that certain facilities at point "A" were certificated by the Commission. This factual clarification, however, does not give substance to Boise's argument. The fact that additional facilities utilized to serve Boise were not certificated previously does not exempt United's facilities serving Boise from our assertion of jurisdiction.

7. Texas Gas Transmission Corporation's application for rehearing is directed solely to the Commission's order that deliveries by United be continued on a emergency

[2] Commission order issued on July 22, 1969, in Docket No. CP67-26 (42 FPC 157).

basis pending the conclusion of the remanded proceedings. It urges the Commission to impose interim volumetric limitations on United's customers affected by this case at the levels which correspond to the maximum takes of such customers in the past as reflected in the record. The issue of volumetric limitations upon certification is one that is to be taken up in the remanded proceedings as we believe the record evidence thereon is presently insufficient. In the interim we have provided that such deliveries shall be subject to curtailment in the same manner as United's other customers.

8. Texas Gulf Sulphur Company, which was granted late intervention by Commission order, issued March 31, 1972, asserts that the Commission was in error in not ordering United to cease further violations of the Natural Gas Act. It further contends that the Commission erred in ordering United to amend in any way its direct sales contracts or to make its direct sales subject to United's FPC Gas Tariff without the consent of its direct customers to the application of such tariff provisions or to any changes therein. Contrary to Texas Gulf Sulphur's assertion the Commission has not ordered United to amend its direct sales contracts. In authorizing United to continue its deliveries on an emergency basis we have, however, imposed certain conditions which we believe are in the public interest.

9. The State of Louisiana and the Louisiana Public Service Commission request an investigation of violations of the Natural Gas Act and of gas reserves alleging that there has been a "deliberate, extensive and wilfull violation by United of the prohibition of Section 7(c) of the Natural Gas Act against any proposed construction or extension of facilities which shall constitute the transportation or sale of natural gas subject to the jurisdiction of the FPC without first obtaining a certificate of public con-

venience and necessity authorizing such acts or operations." This allegation appears to us to be inconsistent with the position taken by these parties that the Commission does not have jurisdiction over the facilities in question. Nevertheless, in finding the New Orleans Division jurisdictional on the basis of unauthorized gas flows, we stated that the Commission's jurisdiction under the Natural Gas Act does not depend upon whether a natural gas company fulfills its obligation thereunder to obtain a certificate of public convenience and necessity. We refrained, however, from issuing a certificate of public convenience and necessity for any of the facilities, sales or services as we found that the record requires amplification. Among the matters to be addressed in the remanded proceedings would be the justification for United's initiation of flows into the New Orleans Division, as well as the requirements of the New Orleans Division for United's interstate flows. The latter would, of course, require a review of gas reserves within the New Orleans Division. Thus, we believe that the remanded proceedings will permit a resolution of these issues. Accordingly, we shall deny the State of Louisiana and the Public Service Commission's petition.

10. The State of Louisiana and the Louisiana Public Service Commission while expressing opposition to the reopening of the record, alternatively request that the record be broadened to include certain information specified in Appendix A of Special Order No. 7-71 of the Louisiana Public Service Commission, issued February 28, 1971. In the remanded proceedings the parties will have an opportunity to present evidence bearing on all issues related to certification. Requests for data may be directed to the Presiding Examiner. As for the motion for stay we do not believe that it would serve the public interest to stay our order and delay the remanded proceedings.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed in this proceeding present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 610 and accompanying Order except as that Opinion is clarified above.

The Commission orders:

(A) The applications for rehearing of the Commission's Opinion No. 610 and order, described herein are denied.

(B) The petition for an investigation of violations of the Natural Gas Act and gas reserves and the motion for stay filed by the State of Louisiana, Louisiana Municipal Association, Parish of Cameron and Louisiana Public Service Commission are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended.

KENNETH F. PLUMB,
Secretary

[SEAL]

Docket No. CP71-89

UNITED GAS PIPE LINE COMPANY

(Issued April 7, 1972)

CARVER, Commissioner, *dissenting*:

My dissent to Opinion No. 610 was broadly stated as embracing a wide array of legal, policy, and procedural differences with the conclusions of the majority, but refrained from any extensive analysis of those issues because the *res judicata* question seemed so clearly dispositive of the proceeding at that time. I remain of that opinion, but feel compelled to comment briefly on two of the substantive matters raised by certain of the parties in their applications for rehearing and not satisfactorily resolved in this order.

A critical element of the jurisdictional finding is the conclusion that gas flows into *and out of* United's Green System-East and, at least on an annual basis, out of the State of Louisiana (Opinion No. 610, par. 37-38). The major producer applicants herein challenge this conclusion as not being supported by the record and erroneous in fact. My analysis, both prior to issuance of Opinion No. 610 and now, supports that position. An important principle has thus been raised and to allow the majority conclusion to go unchallenged is to acquiesce in the erosion of a fundamental concept of administrative jurisprudence.

The majority opinion concedes at various places that it has gone beyond the actual record of this proceeding to reach its conclusions about relative volumes, peak day and annual flows, etc. (e.g., see par. 34, 35, and 41, and footnotes 4 and 5). The concept of "official notice" is a useful one and resort to it is unobjectionable when the document or other factual source is clear on its face. That is not the case here; the conclusions drawn by the

majority are not self-evident from the exhibits or the noticed material themselves. In particular, any finding that gas flows *out of* the Green System-East can be derived only from an *interpretation* of flow diagrams and other technical data, involving a considerable element of expert judgment and opinion. But no witness has been presented to sponsor such an interpretation. Indeed, as to the majority conclusion (par. 38) that gas flows from the Green System-East out of Louisiana, the witness principally relied upon by the majority testified directly that all of the gas put into the Green System is consumed within the State of Louisiana (Tr. 323).

Opinion No. 610 seems clearly to rely on advice received from the Commission's technical staff as to *interpretation* of record and noticed data on a vital point. As such, the advice received is *ex parte* in character and has not been exposed to cross-examination or rebuttal. So far as the reocrd is concerned, therefore, the opinion is not supported by substantial evidence and should be set aside as not complying with the Administrative Procedure Act (Title 5, sec. 556(d), U. S. Code)[1] and its judicial antecedents.

Paragraph 4 of the present order amounts to a confession of weakness on this critical point. While purporting to paraphrase or restate the relevant paragraphs of Opinion No. 610, it actually constitutes a substantial modification of a basic point. We are now told that gas which finds its way out of the Green System-East and transits the length of Green System-West to its juncture with Mid-Louisiana (point "U") "*appears*" to flow out of the state. This is indeed a flimsy predicate for an action having the drastic consequences referred to in my original dissent. Nor is it clear how gas entering Mid-

[1] ". . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence . . ."

Louisiana facilities at or near the Baton Rouge city gate can leave the State. As Texaco's application for rehearing states, Mid-Louisiana's line from the Monroe Field extends in a southerly direction and terminates at Baton Rouge. Its function is to carry gas across a corner of Mississippi back into Louisiana. Gas entering that line at point "U" goes only into Baton Rouge and is consumed there.

Until this proceeding at least, the *Florida Parishes* case represented a high water mark in the use of the commingling theory as a jurisdictional rationale. In its very first paragraph, Opinion No. 610 lays the foundation for the conclusion that that case is controlling here. This ignores a whole host of differences in the two situations, only one of which needs mention for present purposes. The question in *Florida Parishes* was whether intrastate sale of incidental amounts of gas taken from a transmission line which was an integral part of an interstate operation required our certification. Here, the facts are diametrically opposite: at most 3 or 4 percent of the volumes carried by an otherwise separate and distinct intrastate facility may have their origin in sources dedicated to the interstate market. To claim that a situation which was concerned with a 100 percent interstate supply source is identical or even comparable with one that is more than 96 percent intrastate is to reduce all problems and issues to the same dimensions. The public interest demands a better sense of perspective on the part of this Commission.

/s/ John A. Carver, Jr.
JOHN A. CARVER, JR.
Commissioner

EXHIBIT C

COMPARISON OF SIGNIFICANT DATES

UNITED GAS PIPE LINE CO. Docket No. CP71-89	LOUISIANA POWER & LIGHT CO. v. UNITED GAS PIPE LINE CO., *ET AL.*, Case No. 71-2550
1970	
OCTOBER 1, 1970:	
United files certificate application in Docket No. CP71-89, seeking certificate for, *inter alia*, Green System (A. 151; R. 245-246).	
OCTOBER 15, 1970:	
Commission "notices" United's application in Docket No. CP71-89 (A. 152; R. 248).	
1971	
FEBRUARY 12, 1971:	
LP&L files untimely petition to intervene in FPC Docket No. CP71-89 (A. 152; R. 248).	
	1971
	MARCH 31, 1971:
	LP&L files complaint for injunction (Civil Action No. 16, 637) against United, seeking to enjoin United from curtailing gas supply to, among others, LP&L's Nine-Mile Point generating station (A. 3-12; R. 1-16).
	APRIL 27, 1971:
	District Court issues temporary restraining order (A. 111-113; R. 181-183).
	APRIL 29, 1971:
	District Court dissolves temporary restraining order on motion of Commission and United (A. 114-116; R. 186-188).

MAY 14, 1971:

Commission sets Docket No. CP71-89 for hearing and permits LP&L to intervene in such proceeding (A. 153-154; R. 250-251).

JUNE 7, 1971:

Hearings commence in Docket No. CP71-89 (A. 154; R. 252).

JUNE 18, 1971:

Hearings conclude in Docket No. CP71-89.

JULY 30, 1971:

Final briefs filed with Commission in Docket No. CP71-89.

1972

FEBRUARY 9, 1972:

Commission issues Opinion No. 610.

MARCH 3, 1971:

Fifth Circuit (one judge) vacates District Court's judgment of dismissal and reinstates temporary restraining order (A. 117; R. 189-190).

MAY 14, 1971:

Panel of the Fifth Circuit affirms vacation of District Court's judgment of dismissal and remands case to District Court "for an expedited hearing on the jurisdictional issue and on such other preliminary issues as might properly be raised" (A. 119-121; R. 192-197).

MAY 27, 1971:

Reopened hearing commences and concludes before District Court (A. 138; R. 223).

JUNE 30, 1971:

District Court dismisses complaint (A. 266; R. 439).

1972

JANUARY 14, 1972:

Fifth Circuit Court of Appeals enters opinion and judgment.

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SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 12 1972

Nos. 71-1016 And 71-1040

In The

Supreme Court of the United States

October Term, 1971

Federal Power Commission, Petitioner

v.

Louisiana Power & Light Company, et al.

United Gas Pipe Line Company and Pennzoil United, Inc., Petitioners

v.

Louisiana Power & Light Company

On Writs of Certiorari to The United States Court of Appeals For The Fifth Circuit

BRIEF OF TEXACO INC. AMICUS CURIAE

J. Donald Annett
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Kirk W. Weinert
John M. Young
P. O. Box 52332
Houston, Texas 77052

Attorneys For Texaco Inc.

FIDELITY PRINTING COMPANY, INC., HOUSTON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.

No. 71-1040

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., PETITIONERS

v.

LOUISIANA POWER & LIGHT COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF TEXACO INC. AMICUS CURIAE

STATEMENT OF INTEREST

Texaco Inc. ("Texaco"), pursuant to Rule 42(2) of the Court, respectfully submits its brief *amicus curiae*. The Solicitor General on behalf of the Federal Power Commission ("Commission"), United Gas Pipe Line Company and Pennzoil United, Inc. ("United"), and Lousisana Power and Light Company ("LP&L"), the parties to this case, have consented to the filing by Texaco of this brief. Letters

of consent are on file with the Clerk of the Court.

Texaco's interest in this proceeding stems from the fact that it sells substantial quantities of natural gas to United in the vicinity of New Orleans, Louisiana, which gas is taken by United into its New Orleans District pipeline facilities which have come to be known as the "Green System", serving LP&L's Nine-Mile Point electrical generating station, among other customers. This pipeline historically has been operated by United as a separate facility from its interstate pipeline network also located in the area. United represented to its Green System gas suppliers, such as Texaco, that this system was a nonjurisdictional intrastate pipeline, and agreed in its gas purchase contracts with Texaco and other gas suppliers to utilize the gas sold United entirely within the State of Louisiana (R.204-19).

Commencing in 1968, United, without Texaco's knowledge or for that matter without the knowledge or authorization from the Commission, began to inject limited quantities of gas from its interstate pipeline system into the Green System.[1] On October 1, 1970, United filed with the Commission an application seeking certification of the Green System and the sales and services rendered therefrom. Texaco intervened in that proceeding, F.P.C. Docket No. CP71-89, and actively opposed the assertion of Commission jurisdiction over the Green System.

The court below found on the basis of an uncontested record developed by United, the Commission and LP&L, that the Commission's jurisdiction under the Natural Gas

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[1] Considerable doubt exists as to United's motives in commencing these unauthorized and therefore unlawful gas flows. See Commissioner Carver's dissent in Opinion No. 610, reproduced as Appendix F, p. 127a in United's Petition filed herein in No. 71-1040.

Act[2] does not extend over the Green System. The Commission and United have not challenged this conclusion on its merits, but have asked this Court to consider the limited issue of whether or not LP&L should have exhausted its administrative remedies before seeking the help of the courts, by awaiting the outcome of United's certificate case.

Uncertainty exists in this proceeding, as well as in the law generally, between the application of the closely related doctrines of primary jurisdiction and exhaustion of administrative remedies. The fine line between the two need not be drawn in this case in that the Fifth Circuit's decision as to the Green System is proper under either theory. Texaco believes that other briefs herein will adequately set forth the arguments respecting the primary jurisdiction issue. In that the attorneys for the Commission and United have attempted to characterize this issue as one of exhaustion of administrative remedies, Texaco will show herein that under this theory the Fifth Circuit reached the correct result in finding that LP&L's suit was properly taken and that LP&L was not required to resort to administrative procedures.[3] It is to this point that Texaco addresses itself herein.[4]

Any decision by this Court affecting the jurisdictional status of United's Green System could have a substantial

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[2] 15 U.S.C. §§ 717, *et seq.*

[3] Throughout this brief when Texaco uses the term "exhaustion of administrative remedies" it does not assume that LP&L had an administrative remedy to pursue at the time of filing of its suit below. Indeed, the Commission has no power to grant injunctive relief or damages as sought by LP&L. See *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).

[4] Texaco takes no position on the principal issue here before the Court concerning the Commission's continuing authority over curtailments of interstate natural gas to direct industrial cus

impact upon Texaco's gas sales to United. This is the basis of Texaco's interest in this case and the reason it has sought to participate *amicus curiae*.

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The Commission's brief adequately sets forth the opinions below, the jurisdiction of the Court, and the statutes involved insofar as these are relevant to the issue herein with which Texaco is concerned.

QUESTION PRESENTED

Whether LP&L was required to await the outcome of United's certificate case before the Commission prior to seeking relief from the courts for United's failure to deliver its contract quantity of gas to LP&L's Nine-Mile Point electrical generating station.

STATEMENT

Texaco adopts the statement of the case contained in the Commission's brief with two additions. In LP&L's injunctive action in the district court the Commission was

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tomers. It should be noted, however, that this question is entirely separate and may be decided independently of the Court's consideration of the Green System's jurisdictional status. LP&L's Sterlington Station is served from a concededly interstate pipeline and clearly poses the issue concerning curtailment authority of direct independent sales. This question raises substantial policy considerations in this time of national gas shortage. While the question of the jurisdictional status of the Green System is of importance to the customers thereon and the natural gas producers, like Texaco, selling gas to such system, this issue applies only to one of the nation's pipelines and does not involve widespread significance.

an active participant, introducing evidence and cross-examining witnesses on the flows of gas in United's Green System (R.177-82). Secondly, United introduced as an exhibit in that hearing its prepared direct case filed with the Commission in Docket No. CP71-89. The same United witness, Mr. Echterhoff, who sponsored data relied upon by the Commission in its Opinion No. 610 finding jurisdiction over the Green System, appeared and was cross-examined (R.138-43).

SUMMARY OF ARGUMENT

Contrary to the assertions of the Commission and United, no hard and fast rule exists requiring exhaustion of administrative remedies in *all* cases involving administrative jurisdiction. The opinions below recognized this, and analyzed this issue by using the three-part test suggested in a leading text in the field (3 K. Davis, Administrative Law Treatise § 20.03). The use of this approach was reasonable in the circumstances of this case and properly resulted in a finding by the Fifth Circuit that LP&L was not required to resort to administrative action prior to seeking aid from the courts.

The first of the three elements of the test utilized by the court was a determination on LP&L's irreparable injury by awaiting the outcome of United's certificate proceeding. The court correctly found that LP&L has not yet been given an opportunity to prove the extent of its injury, but that the present record does not demonstrate that such injury is not likely to occur.

As a second part of Professor Davis' test, the court found that there is little doubt that the Commission's jurisdiction does not extend over United's Green System which serves LP&L's Nine-Mile Point station. An undisputed

factual record developed by United, the Commission and LP&L clearly indicates the limited flows of gas involved from United's interstate pipeline system into the self-contained Green System. All gas within the Green System, including the small percentage introduced therein from United's interstate lines, is consumed entirely within the State of Louisiana. Utilizing these basic facts the Fifth Circuit properly reviewed the existing legal precedents on commingling of jurisdictional and nonjurisdictional gas and found them inapplicable.[5] Of particular significance is the fact that the court below distinguished the instant situation from that considered in its earlier "*Florida Parishes*" decision, *Louisiana Public Service Commission* v. *F.P.C.*, 359 F.2d 525 (5th Cir. 1966), upon which United principally relied in seeking certification of the Green System from the Commission.

The court below properly concluded that exhaustion of administrative remedies was not required of LP&L because in these circumstances the Commission could contribute little of its special expertise to the determination of its jurisdiction. The Commission had already helped in the development of the record before the court on the gas flows involved. Consideration of the jurisdictional status of the Green System ultimately involved the application of existing law to the undisputed and reasonably uncomplicated facts of the case. The court below, it is submitted, is perfectly capable of determining the legal consequences of United's operation of its Green System.

Finally United has suggested as an additional reason

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[5] *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *F.P.C.* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965); *Louisiana Public Service Commission* v. *F.P.C.*, 359 F.2d 525 (5th Cir. 1966).

for requiring exhaustion of administrative remedies that LP&L's suit disrupted the Commission's consideration of United's certificate case, and will interrupt the normal course of judicial review of the Commission's Opinion No. 610 issued thereon. LP&L has never sought to enjoin the Commission's proceedings, but rather directed its action against United. Further Opinion No. 610 makes clear that the Commission was completely aware of the Fifth Circuit's decision but proceeded irrespectively of such decision. United also cites *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958) for the proposition that an agency order cannot be collaterally attacked *after* judicial review has begun. This case has no application to the problem at hand in that LP&L's suit and the opinions of the courts below all occurred prior to the issuance of Opinion No. 610. No impediment to orderly judicial review of that opinion exists.

ARGUMENT

I

EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT REQUIRED IN EVERY CASE INVOLVING AGENCY SUBJECT MATTER JURISDICTION

In asserting that LP&L should have awaited the outcome of United's certificate case both the Commission and United have principally relied upon *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, *rev'g per curiam* 156 F.2d 821 (D.C. Cir. 1946) and other cases, for the proposition that there exists a long-settled rule of judicial administration that questions relating to an agency's subject matter jurisdiction should be determined by the agency in the first instance. The decisions of

this Court simply do not bear out the contention of the Commission and United that there is such a rule which must be applied in all circumstances. In at least seven cases the Court has passed upon questions of administrative jurisdiction without requiring exhaustion of administrative remedies.[6] As recently observed by the Court in *McKart* v. *U.S.*, 395 U.S. 185 (1969)[7] a case principally relied upon by United:

> "We do not view the cases of Falbo v United States, 32 US 549, 88 L Ed 305, 64 S Ct 346 (1944), and Estep v United States, 327 US 114, 90 L Ed 567, 66 S Ct 423 (1946), insofar as they concern the exhaustion doctrine, as a bar to today's holding. Neither those two cases, nor any of the other cases decided by this Court, stand for the proposition that the exhaustion doctrine must be applied blindly in every case . . . ." (395 U.S. 185, 200-01, n. omitted)

Rather than being an immutable rule, the exhaustion of administrative remedies doctrine is therefore exercised by the Court only where circumstances of a particular case dictate.

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[6] *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947); *Order of Railway Conductors of America* v. *Swan*, 329 U.S. 520 (1947); *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943); *Illinois Commerce Commission* v. *Thompson*, 318 U.S. 675 (1943); *Skinner and Eddy Corp.* v. *United States*, 249 U.S. 557 (1919); and *Gonzales* v. *Williams*, 192 U.S. 1 (1904).

[7] The Court in this case held that in a criminal proceeding concerning the failure of the defendant to report for induction into the Armed Forces, the defendant was not barred from raising the defense that he was a "sole surviving son" of a family whose father has been killed in action while serving in the Armed Forces by the fact that he had not exhausted his administrative remedies. United's reliance on this case is therefore misplaced in that no exhaustion was required. Additionally, the relevance of the discussion on exhaustion in the context of a criminal proceeding is questionable.

In this proceeding the district court's decision, which the Commission and United support, recognized as much. (United Pet. 41a).[8] In considering the exhaustion argument, the district court utilized a test proposed by Professor Kenneth Culp Davis in his *Administrative Law Treatise*, Volume 3, Section 20.03, page 69, involving three factors which should be considered in determining whether prior resort to administrative action is required in a particular proceeding.[9] The court quoted these three criteria as explained by Professor Davis:

> "The key factors are three: extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction. Unfortunately, each of these three key factors is a variable, and each often calls for a considerable amount of judgment for its proper appraisal.
>
> A workable standard probably should not go beyond a statement that each of these three factors should be weighed in determining whether or not a court should decide an issue of administrative jurisdiction without requiring exhaustion of administrative remedies. A neat word formula probably is not feasible." (United Pet. 41a)

Following the statement of this three part test the district court concluded that in the circumstances of this case exhaustion of administrative remedies was required. The Fifth Circuit, however, arrived at a different conclusion (United Pet. 25a-26a), stating:

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[8] "United Pet." references are to the petitions filed herein in No. 71-1040, which contain as appendices the relevant opinions of the Commission and courts below.

[9] The test recommended by Professor Davis has been employed in lower court decisions. See *Lone Star Cement Corp.* v. *F.T.C.*, 339 F.2d 505 (9th Cir. 1964); *United States* v. *Rockland Steamship Corp.*, 218 F. Supp. 509 (S.D.N.Y. 1963); and *Oil Shale Corp.* v. *Udall*, 235 F. Supp. 606 (D. Colo. 1964).

"Both United and the FPC contend that the curtailment proceedings in Docket No. RP 71-29 and the certificate proceedings in Docket No. CP 71-89 are within the jurisdiction of the FPC and that the court was correct in dismissing the present action. All parties cite numerous precedents, most from the Supreme Court. An attempt at rationalization would needlessly lengthen this opinion. The entire area has been thoroughly analyzed by a leading text in the field. It collects and discusses most of the authorities relied on by both sides. It was relied upon by the court below and we rely upon it here. *See* 3 K. Davis, Administrative Law Treatise §§ 20.01 through 20.03.

Because we hold the lower court erred in its holding regarding potential injury and in its views as to primacy of agency jurisdiction, we arrive at a different result in applying Professor Davis' three-part test (§ 20.03).

See Bailey v. *United States*, ... F.2d ..... (5th Cir. 1971) [No. 71-1731, December 8, 1971], and *cf. United States* v. *Hernandez*, ... F.2d ..... (5th Cir. 1971) [No. 71-1656, December 27, 1971]."

Texaco submits that the circumstances of this proceeding are such that LP&L was not required to await the outcome of the Commission's certificate case under the criteria used by the courts below.

A. LP&L Would Sustain Substantial Injury From Pursuit Of Its Administrative Remedies.

The first consideration employed by the court below in considering the exhaustion of remedies problem was the extent of injury which LP&L would suffer from pursuit of its administrative remedy.[10] The question of irreparable

[10] Assuming that LP&L had chosen to await the outcome of the certificate proceeding with respect to the jurisdictional nature of the Green System and if it is ultimately determined in that

injury was at the heart of the proceedings below. In seeking injunctive relief to prohibit United from breaching its contract by failing to deliver the contract quantity of gas to its Nine-Mile Point station, LP&L alleged in its sworn complaint that it supplied electricity to various parishes in Louisiana and had interconnections with all other electrical utility companies in the state and most of the rural electrical cooperatives in the state (United Pet. 7a-8a). Through this network LP&L asserted that it served the electrical needs of numerous domestic and industrial customers as well as governmental subdivisions. Through other interconnections it participated in an area wide electrical network serving 2,500,000 consumers which is still further connected to various power sources throughout most of the eastern part of the nation. LP&L alleged that a failure to utilize the full electrical generating capacity of its Nine-Mile Point station at peak demand periods could cause an area "blackout" or "brownout" with damages beyond any means of calculation. It also asserted that it would lose electrical sales which could never be recovered because of the nature of its stock in trade, *i.e.*, electricity cannot be stored nor can it be delivered at any moment after the immediate demand has passed. A loss of such sales would involve further irreparable injury since the fixed cost of its basic electrical generating facilities continues to be depreciated whether they are used or not.

United and the Commission filed no responsive pleadings with the district court challenging these allegations on the merits (United Pet. 9a).

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proceeding that the Commission has no jurisdiction over such facilities serving LP&L's Nine-Mile Point station, then United's curtailment plan, as approved by the Commission, would not apply to the LP&L Nine-Mile Point station and assumedly no injunction to prevent United from employing such plan would be required.

The Fifth Circuit reversed the district court's finding that no irreparable injury had been shown by LP&L and remanded the case for further hearings in this regard. The court suggests that evidence be considered as to the fuel needs at the electrical generating stations, the alternative sources of energy supply, the amount of power that can be exchanged through interconnected sources and an analysis of LP&L's usual and peak day demands (United Pet. 12a). In summary the Fifth Circuit held that the record "does not demonstrate that such injury *is not likely to occur*" (emphasis added).

The extent of injury to LP&L has therefore not been finally determined. Nevertheless, several observations can be made with respect to this inquiry. First, the allegations of injury raised by LP&L have not been challenged on the merits by United or the Commission. The allegation of lost sales because of inadequate fuel supply will become more compelling as the summer air conditioning season increases the demand for electricity. Any injury being suffered by LP&L as the result of curtailed deliveries to the Nine-Mile Point station has continued since LP&L's suit in this proceeding was instituted in March of 1971, over a year ago, and such injury would continue for some unspecified period into the future while the Commission's deliberations continue in the remanded United certificate case, or conceivably while the Commission's Opinion No. 610 is under review in the Courts. In view of the fact that United is delivering less gas to LP&L's Nine-Mile Point station than called for in its contract, it may be assumed that to some degree LP&L has not been able to generate and sell electricity to its full capability and that irreparable injury has resulted therefrom.

B. There Is Little Doubt That The Commission Jurisdiction Does Not Extend Over United's Green System.

The second part of the test utilized by the courts below in resolving the question of exhaustion of administrative remedies was the evaluation of the degree of clarity or doubt about the Commission's jurisdiction over the Green System. An analysis of the jurisdictional question principally involves applying the existing legal precedent to an undisputed and relatively simple fact situation.

The basic factual predicate was created by the introduction into evidence as an exhibit in this proceeding United's prepared direct case which it had previously submitted to the Commission in connection with its certificate proceeding (R. 138-43). Within this material was an explanation of the flows of gas which have taken place from United's interstate system into the Green System over the past several years. Based upon this evidence and the cross-examination thereof, the Fifth Circuit found that United's intrastate Green System is located entirely within the State of Louisiana (United Pet. 22a). During 1970 United chose to inject limited volumes of interstate gas into the Green System which accounted for some 2.6 percent of United's deliveries to LP&L's Nine-Mile Point station. The court further found that no gas escapes from the Green System back into United's interstate system because of pressure differentials between the lines and the presence of valves separating the two at their limited points of interconnection.

In holding that essentially these same facts give rise to jurisdiction over the Green System, the Commission in Opinion No. 610 relied upon this Court's decisions in *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), ("*Lo-Vaca*"), the companion case of *Federal Power Commission* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965),

("*Amerada*") and the Fifth Circuit's decision with respect to Commission jurisdiction over certain other facilities of United in the *"Florida Parishes"* case, *Louisiana Public Service Commission* v. *F.P.C.*, 359 F.2d 525, (5th Cir. 1966) *cert. denied*, 385 U.S. 833.

The Court's *Lo-Vaca* and *Amerada* decisions are clearly distinguishable in several respects. The Green System unlike the situation in *Lo-Vaca* and *Amerada* does not involve an attempt to clothe interstate gas with an intrastate or nonjurisdictional sales character by contract language. Secondly, *Lo-Vaca* and *Amerada* involved situations where a commingled stream of jurisdictional and nonjurisdictional gas left the state of its origin. The Green System, however, is the exact opposite in that small quantities of gas from jurisdictional sources are introduced into a completely contained intrastate pipeline network and no gas from the Green System leaves the State of Louisiana. Thirdly, *Lo-Vaca* and *Amerada* cannot be read to hold that *every* commingling of jurisdictional and nonjurisdictional gas brings the nonjurisdictional gas within the Commission's jurisdiction.[11] Finally, the Court's *Lo-Vaca* decision rested on the fact that *substantial* rather than *de minimis* volumes of commingled gas were at issue.[12] The Court held:

> "The fact that a *substantial part* of the gas will be resold, in our view, invokes federal jurisdiction at the outset over the entire transaction . . . ." (379 U.S. 366, 369, emphasis added)

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[11] *Cf. Public Service Electric & Gas Company* v. *Federal Power Commission*, 371 F.2d 1 (3rd Cir. 1967); *Secretary of the Army* v. *Federal Power Commission*, 425 F.2d 496 (D.C. Cir. 1969).

[12] In its Opinion No. 610 the Commission found that the volumes of interstate gas introduced into the Green System were not *de minimis*, principally relying on "peak day" deliveries of such volumes (United Pet. 101a). It is erroneous to take a single "worst case" example in the year to judge the degree to which interstate gas has been injected into the Green System.

The *Florida Parishes* case is likewise distinguishable in that the facilities involved in that decision were determined to be an integrated part of United's interstate operations. In this case, however, United's Green System is entirely separate, with its own nonjurisdictional gas supply. The Fifth Circuit found no difficulty in distinguishing its earlier opinion in *Florida Parishes* from the case at bar (United Pet. 24a).

The Commission and United also suggest that the Commission's jurisdiction exists over the Green System by virtue of this Court's holding in *Connecticut Light and Power Co.* v. *Federal Power Commission*, 324 U.S. 515 (1945) and *Federal Power Commission* v. *Florida Power and Light Co.*, No. 70-38, decided January 12, 1972. Both of these cases arose under the Federal Power Act[13] rather than the Natural Gas Act,[14] and involve the transmission of nonjurisdictional electricity across a state boundary. As previously mentioned no gas once having entered the Green System leaves the State of Louisiana. Therefore, these cases like *Lo-Vaca and Amerada* are distinguishable from the situation here under consideration.

The Commission's jurisdictional determination over the Green System in Opinion No. 610 was likewise in error in its failure to recognize that Congress in amending the Natural Gas Act in 1954 to add Section 1(c)[15] known as the "Hinshaw Exemption" expressed its clear intention to exempt operations such as United's Green System from Commission jurisdiction.[16] The legislative history of the

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[13] 16 U.S.C. §§ 800, *et seq.*

[14] 15 U.S.C. §§ 717, *et seq.*

[15] 15 U.S.C. § 717(c), reproduced in footnote 7, Opinion No. 610 United Pet. 108a).

[16] *Cf. Virginia Petroleum Jobbers Ass'n.* v. *F.P.C.*, 265 F.2d 364, 368 (D.C. Cir. 1959), discussing Congress' intent to overcome *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950).

enactment of the Hinshaw Amendment clearly indicates Congress' intention. As stated in Senate Report No. 817, July 30, 1953, accompanying H.R. 5967:

> "The purpose of this legislation is to clarify the Natural Gas Act by further defining the limits of the Federal Power Commission's jurisdiction with respect to operations of companies engaged in the local distribution within a State of out-of-State natural gas which has been received by such a company at or within the state borders." (1954 U.S. Code Congressional and Administrative News, p. 2102)

The only requisites for operation of Section 1(c) of the Act are that the jurisdictional gas received in the state be ultimately consumed in such state and that the rates charged, services performed, and the facilities used be subject to the regulation of the state regulatory commission. The record in this case clearly indicates that the jurisdictional gas received in the Green System is ultimately consumed in the State of Louisiana. The State of Louisiana in its motion filed herein for leave to orally argue as *amicus curiae* dated April 3, 1972 clearly indicated that it is ready, willing and able to perform its duty to the extent permissible under its State Constitution as a state regulatory agency over United's Green System. The instant factual situation concerning the Green System is precisely the type which was considered by Congress to be "primarily of local nature and subject to the regulation of the several states."[17]

It is clear, therefore, that the Commission's jurisdiction does not exist over United's Green System under the applicable precedent. The need for resort to administrative remedies by LP&L was not required in these circumstances.

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[17] 15 U.S.C. § 717(c).

C. No Specialized Administrative Understanding Of The Question Of Jurisdiction Over The Green System Is Involved.

The final element in Professor Davis' three-part test is an inquiry into the degree to which an administrative agency may be required to sort through the various contentions of parties and to apply its special expertise to the matters concerning its jurisdiction. As noted above, in this proceeding the Commission fully participated in the development of the record upon which the Fifth Circuit's decision respecting jurisdiction over the Green System was made. The record shows no dispute as to the material facts involved.[18] The question of application of existing legal precedent is one within the capability of the court which properly exercised its prerogatives to decide legal issues.

The Commission and United in their briefs have suggested that the Fifth Circuit's decision on the jurisdictional issue was inappropriate because the court did not have before it evidence which was presented in the certificate proceeding before the Commission. It is cited that the Commission's record in the certificate proceeding consisted of 1,276 pages of transcript, 63 exhibits and ten items by reference. This recitation is misleading in that the bulk of the testimony, exhibits and items by reference in the certificate case related to issues other than the Commission's jurisdiction over the facilities involved. United tendered a single witness, Mr. Echterhoff, on the critical issue of gas flows into the Green System from United's interstate facilities. Mr. Echterhoff's same testimony was also introduced in the injunctive hearing below. Therefore, the possible

[18] The same was true with respect to the record before the Commission in United's certificate case. There the Commission granted waiver of the presiding examiner's initial decision, apparently feeling that there was no need for his assistance in considering the uncomplicated and undisputed fact situation.

distinctions on the jurisdictional point between the record available to the Commission in the certificate case and the record available to the court below lie in the extent of the direct and cross-examination by various parties to either proceeding. It must be reiterated, however, that the testimony on the gas flows, a subject uniquely within United's knowledge, was not rebutted by testimony of any party in either the Commission's certificate case or in the proceedings below.

For the foregoing reasons it is submitted that no particular degree of administrative expertise is required in these circumstances to sort through a complicated and contradicted factual record. The flows of gas involved are undisputed and reasonably simple in concept. The principal difficulty is in the application of existing law to these undisputed facts, a subject which the Court is as capable of performing as the Commission.

For the foregoing reasons Texaco submits that the Fifth Circuit was justified in not requiring that LP&L await the outcome of United's certificate case, a process which may take an indefinite length of time in view of the potential court review of Opinion No. 610 as well as the uncertainty as to the remanded certificate proceeding still before the Commission. It is likely that LP&L has suffered and will continue to suffer irreparable injury from imposition of United's curtailment program to LP&L's Nine-Mile Point station. There is no doubt that the Commission's jurisdiction does not extend over the Green System. Finally the determination of such jurisdiction is not a matter which falls uniquely within the Commission's field of expertise in this case.

II

THE INSTANT PROCEEDINGS HAVE IN NO WAY INTERRUPTED THE COMMISSION'S CERTIFICATE PROCEEDING CONCERNING UNITED'S GREEN SYSTEM OR THE PROCEDURES FOR ORDERLY REVIEW OF THE COMMISSION'S OPINION NO. 610 ISSUED THEREIN

United has raised as an additional reason why LP&L should exhaust its administrative remedies, the claim that the instant proceedings have in some way disrupted the Commission's consideration of United's certificate case as well as the orderly judicial review of Opinion No. 610 issued in the proceeding, pursuant to Section 19(b) of the Natural Gas Act.[19] United has recognized, however, that unlike the situation in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), LP&L has not sought an injunction against the Commission's certificate proceeding which has continued unabated through the hearing stage in June 1971 and in which Opinion No. 610 was issued on February 9, 1972 (United Pet. 91a). From a reading of the Commission's Opinion No. 610 it is apparent that the Commission, while aware of LP&L's actions below, was not deterred from continuing its consideration of the certificate case. The Commission stated:

> "73. In *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, Fifth Circuit No. 71-2550, decided Jan. 14, 1972, ... F.2d ....., the court held that '. . . The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction' (Slip Op. p. 29). Since we respectfully disagree with the legal conclusion drawn by the court, we are constrained to consider the question of whether this

[19] 15 U.S.C. § 717r(b).

Commission is precluded from making an independent decision based upon the record in the case before us. (United Pet. 121a-122a)

• • • •

"83. We conclude that we are not precluded from reaching a decision by the action of the court's opinion. The LP&L case is a collateral attack on the Commission's jurisdiction to hear and to decide the case presented in Docket No. CP71-89. Counsel for the Commission, authorized and directed to appear for the Commission as intervener in the collateral suit, asserted the primary jurisdiction of this Commission to decide the case; — the Commission did not — and could not — take a position on the merits until this decision was reached. Therefore, the instant decision is the first opportunity we have had to decide the issues entrusted to us by the Congress through the Natural Gas Act, subject to court review. We thus feel constrained to state for the review of any Court of Appeals and the Supreme Court, if certiorari be granted, the findings and conclusions of law in the order herein entered." (United Pet. 124a)

United has also cited the case of *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958) and two lower court decisions for the proposition that "when Congress has provided statutory procedures designed to permit agencies expertise to be brought to bear on particular problems these procedures are to be exclusive" (United's Brief p. 23). Texaco submits that the *Tacoma* case stands for the proposition that review of a Commission order must follow the procedures set forth in the applicable judicial review section of the agency's enabling statute and may not be attacked *after* issuance of the order in a collateral proceeding. This problem is simply not presented in this case. LP&L's suit below was brought long before the Commission issued its Opinion No. 610 in the certificate case and in fact the decision of the Fifth Circuit below likewise pre-

ceded the issuance of the Commission's decision. Therefore, the instant proceeding cannot be characterized as in any way interfering with the orderly review of Opinion No. 610. Applications for rehearing have been filed to the Commission's order. Nothing in this proceeding will prevent any party from following the regular procedure of taking an appeal to an appropriate circuit court upon issuance of the Commission's order on rehearing.[20]

United's concern over the interruption of the orderly process of appeal has a particularly hollow ring when considering the fact that United petitioned this Court for direct review of the Commission's Opinion No. 606 in its curtailment proceeding without the benefit of the Fifth Circuit's consideration of that matter. While the Court denied United's petition with respect to this request, United and the Commission fervently argue herein for a decision on the merits on the Commission's curtailment powers which would unquestionably affect the decision of the Fifth Circuit on this matter. Thus, while United is perfectly willing to have the power of the Commission over curtailments decided in this proceeding it argues that an appropriate court of appeals must be given full rein to consider the question of the jurisdiction over the Green System, unencumbered by the decision of the court below.

---

[20] On April 7, 1972 the Commission issued its Order on rehearing, Opinion No. 610-A, reaffirming its prior finding of jurisdiction over United's Green System in Opinion No. 610. Texaco believes that Opinion No. 610-A will be set forth as an appendix to the Amicus Curiae brief filed hereby by Humble Oil and Refining Company. Texaco respectfully commends to the Court's attention the dissenting statement of Commissioner Carver wherein he points out the fact that the Commission's jurisdictional determination was made on the basis of extra-record, *ex parte* advice from the Commission's Staff. This disclosure creates an additional reason why the Fifth Circuit's decision with respect to the Green System should be left undisturbed.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed as to the nonjurisdictional status of United's Green System serving LP&L's Nine-Mile Point station on the basis that the court had all necessary authority to decide this issue.

Respectfully submitted,

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April 12, 1972

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IN THE

Supreme Court of the United States

October Term 1971

Nos. 71-1016 and 71-1040

FEDERAL POWER COMMISSION, *Petitioner,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents.*

UNITED GAS PIPE LINE CO., ET AL., *Petitioners,*

v.

LOUISIANA POWER & LIGHT CO., ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF STATE OF LOUISIANA AMICUS CURIAE

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IN THE

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF STATE OF LOUISIANA AMICUS CURIAE

LOUISIANA'S INTEREST

Louisiana is the largest gas exporting state and the second largest gas producing state in the nation.[1] It delivers to other states 47.9% of all natural gas exported by producing states to meet the needs of other states which cannot supply their own requirements.[2] Louisiana marketed production of 7,227,826 trillion cubic feet of natural gas was 34.9% of United States production in 1969.[3]

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[1] Appendices A, B. and C, 1a-3a.

[2] Appendix A, 1a.

[3] Appendix D, 4a.

Over 73% of its total production is exported to other states, on a net delivery basis[4] During the last decade, gas exports have increased dramatically. Using 1960 as a base year, exports increased by 31.8% in 1965 and by 100.4% in 1970.[5]

In 1960, 31.5% of locally produced gas was consumed within the state. By 1965, this percentage declined to 27.2% and in 1970 to only 20.6%[6]

Plainly, Louisiana contributed more than its fair share to the national pool of natural gas and retains only a fifth of its own gas production for interstate use.

Historically, gas producing states have certain advantages over states which do not have their own gas supply. Their very proximity to the source of production attracts industries which use gas as the raw material without which their plants could not operate. The lower transportation costs of delivering gas to other industrial and commercial users within the state makes its use particularly attractive for such applications. It is not surprising, therefore, that producing states have a higher proportion of industrial-commercial consumption of total gas consumed and of firm gas than consuming states. Louisiana utilizes 84% of the total quantity of firm gas sold in the state for industrial and power plant generation purposes, in comparsion to a national average average of only 37%[7]

Louisiana's economy is heavily dependent upon the availability of a firm, reliable and uninterrupted supply of natural gas. Statewide investment by industrial category

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[4] Appendix E, 5a.

[5] Appendix F, 6a.

[6] Appendix F, 6a.

[7] Appendix K, 11a.

clearly reflects the predominance of petroleum, refineries and chemicals which represented $465,297,370 or 76% of a total industrial investment of $609,578,850 in 1970.[8] Apart from these industries which use natural gas a process gas without which their plants cannot function, the state's electric utilities are completely dependent upon natural gas as fuel for electric generators.

Thus, the economic welfare of the state hinges upon the continued delivery of the volumes of gas it received and used prior to United's curtailment and upon the ability to draw upon greater volumes. Otherwise, its economy will be frozen at or below its present level. This is not true of other states in which natural gas plays a subsidiary rather than a dominant role in the overall economy of the state and in which the electrical utilities have alternate power sources such as coal, imported liquified natural gas and inexpensive hydroelectric power.

The state currently has an unemployment rate of 8.3% as of June 1971. This is the highest rate for the month of June since 1962. While the state rate was increasing, the national rate dropped to 5.6%.[9]

Other, more fortunately situated states, have as their principal economic assets resources which are neither depletable nor of only temporary value. Louisiana's wealth is in its oil and natrual gas energy resources, which are, by definition, a wasting asset. It is fact of life that each cubic foot of gas produced generates only one-time non-recurring income for

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[8] Louisiana Horizons, Publication of the Louisiana Department of Commerce and Industry, Winter, 1971, p. 5.

[9] Louisiana Labor Market, Department of Employment Security, June 1971.

the State of Louisiana. Furthermore, the cost of locating, drilling and producing natural gas in Louisiana is higher than the cost of producing gas in other states. Its gas wells are 50% deeper but cost twice the national average. Even dry holes in Louisiana are three times as costly as the national average.[10] Because of these unique and adverse factors, Louisiana's present predominance as a supplier of energy to the nation is exposed to a genuine and substantial threat that unlimited supplies of atomic energy used to generate electricity will, within the next two decades, supplant natural gas. Thus, if Louisiana is deprived of the opportunity to use an equitable share—which is far less than the share it exports—of its temporarily valuable natural gas resources, it will be inequitably and irreparably injured.

United Gas Pipe Line Company (United) operated an integrated interstate natural gas system extending across several states[11] before the enactment of the Natural Gas Act (Act). A grandfather certificate of public service and necessity covering the operation of such interstate facilities was issued on November 10, 1942.[12] United has also operated, on a completely separate basis, intrastate pipeline systems in Southern Louisiana which have always been regulated exclusively by the Louisiana Public Service Commission (LPSC). Such regulation has never hampered or impaired the effectiveness of regulation of United's interstate activities by the Federal Power Commission (FPC) and no such claim has been made.

---

[10] *Louisiana Oil and Gas Facts*, Eleventh Edition, Louisiana-Arkansas Division, Mid-Continent Oil and Gas Association.

[11] United Gas Pipe Line Company, 3 FPC 562.

[12] Id., at 863.

United is the principal supplier of gas used within Louisiana. But, the share of the state's total gas requirements supplied by that pipeline has been consistently declining because it is using ever increasing quantities of state produced gas to meet the needs of its interstate customers.

In 1960, United supplied 61.4% of all gas consumed within the state. In 1965, it supplied only 58.6% of such gas. In 1970, it supplied only 47.5% of such gas.[13] In 1965, United had increased its exports of Louisiana gas by 6.5% from 1960. By 1970, however, this percentage had increased to 62.1%[14a] If this trend continues, and an assumption of certificate jurisdiction by the FPC is certain to accelerate it, gas volumes delivered to United's intrastate customers in Louisiana will be constantly and progressively diminished.

The FPC's assertion of power to reallocate firm direct sale gas to resale customers will have an abnormally severe impact on Louisiana. As Commission Carver noted in his dissent to Opinion No. 610, 68% of the gas volumes delivered in United's New Orleans District (Green System–East) represent direct industrial sales.[14b] Furthermore, only 110,797 million cubic feet of the total of 1,607,609 million cubic feet of firm gas used within Louisiana is applied to residential and commercial uses and purchased for resale.[14c] In addition, the FPC's assertion of further power to control the end-use of natural gas by ultimate consumers will have an equally disproportionate impact on Louisiana as compared to its impact on other states. In the nation as a whole, only 37% of all firm gas purchased is used for industrial and power plant genera-

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13 Appendix F, 6a.

14a Appendix F, 6a.

14b United Pet., ftn. 1, 128a.

14c Appendix M, 13a.

tion purposes while the corresponding figure for Louisiana is 84%. Again, firm gas used for electric generation is 89% of all gas used for such purposes in Louisiana, as compared to 49% in the nation as a whole.[14d] The FPC's end-use test disregards the long established and universally recognized service priorities of firm over interruptible gas. Thus, although 93% of all gas used in Louisiana is firm, as compared with a national average of 69%[14e] it will bear the economic burden and dislocation of United's curtailments to a far greater extent than other states served by this pipeline.

Apart from these considerations, the FPC's arbitrary and capricious refusal to even consider the State's suggestion of a nationwide allocation proceeding to fairly distribute interstate gas supplies between states, leaving to such state the responsibility for controlling the end-use of gas by its own citizens, casts its so-called curtailment plans in a framework which ignores such oppressive and severe discrimination and excludes any consideration of the equities of a producing state.[14f] Finally, United's Louisiana customers obtain all of their requirements from this pipeline; have no peak shaving facilities or underground storage. By way of contrast, its resale pipeline customers and their distributor customers obtain only part of their requirements from United and have both

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[14d] Appendix L, 12a.

[14e] Appendix M, 13a.

[14f] Opinion No. 606-A in the curtailment case denied the State's request, on rehearing, that the issues remanded to the examiner to encompass consideration of such matters on the basis of a single sentence comprising the circular statement that "... we have determined that the proper scope of this proceeding is that set forth in Opinion 606." Commissioner Carver dissented from the denial of rehearing principally because he felt that the FPC had missed an opportunity to correct some of the extravagances of its jurisdictional assertions (Sol. Gen. Pet., 89a).

peak shaving and underground storage capabilities.

In an "Environmental Impact Statement" submitted by United in the curtailment case on March 24, 1972, it admitted that Gulf States customers have borne the brunt of its curtailments, stating:

> *"The curtailment of United's deliveries to city gates, power plants and industrials within the Gulf-South from Texas to Florida, as shown in EIS Exhibit 1, has, to date, indirectly resulted in the only substantial impact upon the environment in any way attributable to United's curtailment program, since United's pipeline customers have been able to offset the effect of United's curtailment by utilizing alternate sources of gas.*[1] The geographical distribution area served by these pipeline customers may also be taken into account because United's average day curtailment is spread equitably among all of United's direct and indirect customers. As noted, however, the primary effect of United's curtailment program is in the area served directly by United."

---

1 Natural Gas Pipeline Company of America is an exception, but it obtains only a very small part of its total requirements from United." (Emphasis added).

Furthermore, the gas volumes reallocated from Louisiana direct sale customers to resale customers are used to meet the needs of *industrial*—not *domestic* and *commercial*—customers in other states. United's initial brief to the FPC blandly admits that:

> "The pipelines have significant interruptible loads which are served both directly and indirectly through distributors (tr. 3270). Sales to these *interruptible* loads have continued in very substantial

quantities despite United's curtailment (Item by Reference Z)." (Emphasis added).

In other words, the purpose of United's curtailment plans is to divert *firm* direct sale gas to *interruptible* industrial consumers served by its pipeline distributor resale customers.

SUMMARY OF ARGUMENT

I

THE FPC HAS NO STATUTORY POWER TO REALLOCATE THE GAS SUPPLIES OF DIRECT SALE CUSTOMERS TO RESALE CUSTOMERS

A. The FPC asserts an urgent need for statutory authority to override the terms of direct sales contracts in times of emergency caused by a pipeline's inability to meet its contract committments to deliver firm gas. The thrust of the arguments is that this court must construe the Act broadly, and in disregard of the deliberate and meticulous exclusion of direct sales from the scope of the agency's regulatory powers by Section 1(b), because a new and unforeseen situation has created an emergency. But, Congress was fully aware of the total dependence of pipelines and their customers upon a depleting asset in finite supply. Section 7(b) is the only provision of the Act which specifically refers to gas shortages and it permits an abandonment only upon findings of depletion of the gas supply or that the public interest permits such action. Certificates of public convenience and necessity are granted only upon a showing of satisfactory gas reserve lives and deliverability volumes.

All direct and resale contracts contain impairment of deliveries terms establishing definite service priorities between classes of customers and fixing the rights and liabilities of the seller and buyer when the pipeline improvidently assumes obligations to deliver firm gas in quantities exceeding either its gas supply or transmission capacity. Congress intended interstate pipelines to have an absolute and unconditional obligation to meet such firm delivery commitments. This explains why it did not equip the FPC with express statutory powers to deal with the abnormal and extraordinary situation of either an individual pipeline systemwide, or a nationwide, gas shortage. Congress delegated express emergency authority to deal with shortages of electrical energy to the FPC in Sections 202(c) and 202(d) of the Federal Power Act. This omission was deliberate and reflected an awareness of the vital differences between the natural gas and electric utility industries.

The FPC has repeatedly, and unsuccessfully, sought an amendment of the Natural Gas authorizing it to safeguard the available gas supply in emergency situations.

B. Petitioners admit that the FPC lacks rate and tariff jurisdiction over direct sale contracts. Nevertheless, the FPC's order No. 431 required United and all other pipelines to file curtailment plans applicable to such contracts as tariffs. Thus, despite its disclaimer of jurissdiction, the FPC is changing the terms of such contracts by a method clearly proscribed by Section 1(b). In asking Congress to amend the Act by granting authority to regulate the *price* and *other terms*, of such contracts, the FPC has twice admitted that it has no such statutory authority.

C. The FPC is seeking to improve upon the provisions of the Act, by asserting plenary jurisdiction in an area where it has been expressly granted only limited jurisdiction over the gas delivery obligations of pipelines. Sections 4 and 5 of the Act authorize the regulation of *service* as well as of *rates*. The

prohibitions against undue preference or advantage between customers and against unreasonable differences in services between localities or classes of service apply to the allocation of inadequate mainline transmission capacity of an interstate pipeline, among its resale customers (*Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784, 789 (CA 6); *Michigan Consolidated Gas Co.* v. *FPC*, 203 F.2d 895, 901 (CA 3); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F.2d 675, 679 (CA 3)). Such authority can only be exercised upon express findings that the pipeline's service priorities are unduly preferential or discriminatory. No such findings have ever been made with respect to either United's direct sale or resale impairment of delivery contract terms.

Both the plain language and structure of Sections 4 and 5 of the Act limit the FPC's powers to regulate rates and services to gas delivered by an interstate pipeline to a resale customer. The term "persons" in Section 4(b)(1), and the powers of the FPC to change unduly discriminatory or preferential rate designs under Section 5(a), are limited in scope to resale rates affecting gas distributors and the ultimate consumers purchasing from them. (*Fuels Research Council, Inc.* v. *FPC*, 374 F.2d 842, 852-853).

D. Petitioners claim that if direct sale customers obtain gas for industrial purposes while resale customers are unable to meet all of their needs for domestic and commercial use, there will be an undue preference to the former class of service. On this premise, they argue that the Court of Appeals holding that the FPC lacks curtailment jurisidction over direct sales is inconsistent with, and undermines, the agency's jurisdiction under Sections 4 and 5. However, the FPC lacks statutory authority to consider the end-use of gas or conservation factors in proceedings under Sections 4 and 5 (*FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 608-614; *Fuels Research Council, Inc.* v. *FPC*, 374 F.2d 842, 853-854 (CA 7); *City of Detroit* v. *FPC*, 230 F.2d 810, 816-817 (CADC)).

Plainly then, the FPC cannot establish priorities, regulating different classes of end-use by ultimate consumers, in the exercise of its rate and tariff jurisdiction. Nor can it eliminate price discrimination between resale and direct sale customers to equalize rates and charges between these classes of service. (*Panhandle Eastern Pipe Line Co.* v. *FPC* 324 U.S. 635, 647). By the same token, it cannot remedy service discrimination arising from more favorable impairment of delivery terms in direct sale contracts.

E. The FPC has no statutory authority to reallocate gas supplies between direct sale and resale customers or to control the end-use of natural gas by ultimate consumers. In *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 17; this Court held "... the Commission's powers under Section 7 are, by definition, limited..."; it "...cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weight against certification." An effort by the FPC to reallocate the portion of the mainline transmission capacity of an interstate pipeline in excess of its delivery commitments to firm customers from direct sale industrial users to resale customers was held unlawful under Section 7(a) of the Act because it would impair the pipeline's ability to render adequate service to its existing customers. In that case, the FPC was exercising its Section 5(a) authority to eliminate unduly discriminatory or preferential practices or contracts and its Section 7(a) authority upon a finding that it was in the public interest for the pipeline to supply additional capacity to its resale customers. (*Granite City Steel Co.*, v. *FPC*, 320 F.2d 711, 713 (C.A.D.C.)

F. There is no merit to the FPC's novel and unprecedented theory that it has concurrent and coextensive jurisdiction over interstate transportation and sales for resale under Section 1(b). This reading of the Act is designed to

evade the prohibition in the very same section against regulation of any aspect of the prices and terms of direct sales. This is an argument that the FPC can achieve indirectly what Congress has prohibited it to do directly.

In any event, Section 1(b) is not a grant of any self-executing substantive power. Rather, it is a mere definition of the scope of the regulatory powers conferred by the Act which is cast in terms of the types of transportation and sale transactions Congress committed to federal regulation and reserved to state regulation. Each of the substantive sections of the Act empowers the FPC to regulate a different subject, and the individual powers thereby conferred must be exercised in accordance with the specific procedures prescribed by Congress. Furthermore, in implementing its powers under any section of the Act, the FPC cannot claim implied power which was expressly withheld in another section of the Act. (*Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F.2d 675, 679-680 (CA 3); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 247 F.2d 306, 310-313 (CA 3)).

In a completely parallel situation, this Court has specifically condemned an attempt by the FPC to combine Sections 1(b), 4, 5, 7, and 16 for the purpose of circumventing a specific exemption in Section 1(b), concerning production or gathering (*FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 499, 504, 507-508).

G. Petitioners' attempts to imply coextensive and concurrent power over transportation and sale also run afoul of the interrelationship between the certificate and rate sections of the Act. Section 7 is the statutory vehicle for initially dedicating natural gas supplies to interstate movement and for initially authorizing the use of pipeline facilities for the interstate transportation or sale of such gas supplies. The powers granted to the FPC in Section 4 and 5 only become operative after such initial certification of natural gas in inter-

state commerce by means of a permanent certificate. This very contention was specifically rejected in *United Gas Pipe Line Co.* v. *FPC*, 388 F.2d 385, 388 (CA 5), where the FPC justified its classification of wholly unregulated direct sales as regulated business activities, for the purpose of applying its consolidated tax return savings formula, on the ground that such sales were subject to its certificate jurisdiction with respect to transportation. The Court of Appeals held that the FPC's "certificate jurisdiction is not the same as its rate jurisdiction".

In any event, even if the FPC had coextensive and continuing jurisidiction under the certificate and rate sections of the Act, its claimed power to reallocate gas supply volumes would only be exercised if such transportation authority is of a *continuing* nature. But, it is hornbook law that an administrative agency cannot alter or amend a previously issued permanent certificate in order to implement a changed regulatory policy unless its enabling act specifically provides for modification or revocation of such certificates (*United States* v. *Seatrain Lines*, 329 U.S. 424, 428-432; *American Trucking Association* v. *Frisco Co.*, 358 U.S. 133, 146; *Watson Bros. Transportation Co.* v. *United States*, 132 F. Supp. 905 (D.C. Neb.) aff'd. 350 U.S. 927). The FPC's reallocation of gas supplies is such a change in policy and the act does not confer such authority.

H. United filed with the FPC tariff provisions, applicable for the first time to its direct sale customers and to its resale customers served by the separate intrastate pipeline systems in Southern Louisiana regulated by the LPSC and in derogation of their contract rights, which the agency made effective without any statutory findings that the existing contract terms were unduly preferential or discriminatory or that the revised terms were fair and lawful. But, the FPC cannot utilize the tariff revision procedures of Section 4 to change either the rates or terms of service rendered to even interstate

resale customers subject to its jurisdiction, unless they have consented to such unilateral changes by pipeline suppliers in their contract rights. (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 333, 342-344; *United Gas Pipeline Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 112-113). The FPC seeks to evade the rule of *Mobile* on the strained and tenuous theory that although a pipeline cannot unilaterally change the terms of its contracts governing service priorities in the event of a gas shortage, the agency may order such companies to formulate curtailment plans reallocating their gas supplies from direct sale to resale customers and to file such plans as tariffs. This is a brazen and transparent attempt to circumvent the express requirement of Section 5(a) that as a condition precedent to the exercise of its power to prescribe any rate, practice or contract the agency must find the existing tariff provision unlawful.

I. Petitioners claim that unless that the FPC has power to override the terms of direct sale contracts dealing with impairment of deliveries, there will be an "attractive gap" in the regulatory scheme.

However, Congress committed to the exclusive regulatory control of the states the rate, licensing and service aspects of direct sales made by use of the interstate facilities of a jurisdictional pipeline (*Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 512, 513-514, 516-519; *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 333-337). The Act withheld from the FPC power to remedy undue discrimination or preference between such state regulated direct industrial consumers and federally regulated resale distributors and pipelines, and the industrial consumers they serve, because the granting of such power would have invaded the constitutional prerogatives of the states to regulate such commerce which have not been limited by the Act. Thus, the FPC's regulation of direct sales violates the Act and invades powers reserved to the States

under the Tenth Amendment to the United States Constitution.

Apart from these considerations, the FPC's individual pipeline company, systemwide basis for rationing and reallocating gas deliveries creates, rather than corrects, undue and unlawful discrimination and preference between end-users of the same class in each state and in different states. It can insure, at most, only equal treatment to all customers of the same pipeline. It cannot afford equal treatment to end-users of the same class whether they are located in the same state or in different states. However, the State's suggested nationwide approach of allocating gas supplies to states, leaving to each state the responsibility for controlling the end-use of gas by its own citizens, would treat all states and localities fairly.

Moreover, the FPC is exceeding its statutory powers and invading prerogatives Congress deliberately left to the states when it seeks to control the end-use of gas by ultimate consumers. Each state is entitled to its own choice of service priorities and is not obliged to make them identical with those of other states. While admitting that it lacks jurisdiction to control end-use of natural gas by ultimate consumers, the FPC is unlawfully exercising such jurisdiction.

The State submits that the explicit language of the Act, which leaves no latitude for inference concerning Congressional intent; its clear legislative history; the consistent administrative interpretation of the Act by the FPC that it lacks power to change the price or terms of direct sale contracts and that agency's repeated and unsuccessful attempts to have the Act amended to grant such authority compel the conclusion that uniform federal regulation is neither appropriate nor lawful insofar as direct sales are concerned.

II

THE COURT OF APPEALS JUDGMENT THAT UNITED'S GREEN SYSTEM IS AN INTRASTATE PIPELINE WAS NOT AN ABUSE OF ITS JUDICIAL DISCRETION

The issue decided on the merits by the Court of Appeals was whether, by the self-serving and unlawful acts of United, this intrastate system has been converted to an interstate system to oust the LPSC of its lawful jurisdiction. This is not the normal situation of a dispute between a private party and a federal administrative agency concerning a matter within its established statutory powers to which the doctrine of exhaustion of administrative remedies applies. Rather, this is a controversy concerning conflicting and mutually exclusive claims of jurisidction between Louisiana and the Federal Power Commission. The supremacy clause of the Constitution is inapplicable to resolution of this issue unless and until the courts have rendered a final judgment in favor of the FPC. The FPC has no authority at all over intrastate commerce and Section 1(c) of the Act reserves regulation of intrastate pipelines and of local distribution systems entirely to state regulation. The FPC must defer to the states on matters of such primarily local concern.

Even if this case is regarded as a conventional injunction proceeding, the Court of Appeals did not abuse its judicial discretion. The cases cited by petitioners involve attempts by a private party challenging the jurisdiction of a federal administrative agency to enjoin or to otherwise terminate, by declaratory judgments, administrative proceedings concerned with the determination of so-called "jurisidictional facts" which will determine whether that party is subject to regulation. No such effort was made here and the administrative and judicial review process continue completely unimpeded and uninterrupted.

This Court has rejected the primary argument made here that the FPC is the sole competent judge of the scope of its own jurisdiction and that courts must defer to the pendency of its administrative proceedings until it can determine its own power and the necessity of its exercise (*FPC* v. *Panhandle Eastern Pipe Line Co.*, 172 F.2d 57, 59-60, aff'd, 337 U.S. 499, 514-515). Where an agency is clearly acting in excess of its statutory authority exhaustion of administrative remedies is unnecessary (*Leedom* v. *Kyne*, 358 U.S. 184).

Unlike the cases cited by petitioners, where the only exposure to injury of the parties seeking court relief was the burden and expense of participating in an agency hearing which this Court does not view as irreparable injury (*Petroleum Exploration, Inc.* v. *PSC*, 304 U.S. 209, 220-221), LPL alleged clear irreparable injury. The question of certificate jurisdiction was decided by the Fifth Circuit upon the basis of undisputed facts and purely as a matter of statutory interpretation and the applicability of judicial precedents. Such issues are within the specialized competence of the courts, not that of the FPC. If petitioners' exhaustion view has merit, the FPC's issuance of a final opinion and its denial of reharing moot the very procedural issue they seek to have reviewed by this Court.

ARGUMENT

I.

THE FPC HAS NO STATUTORY POWER TO REALLOCATE THE GAS SUPPLIES OF DIRECT SALE CUSTOMERS TO RESALE CUSTOMERS

A. THE FPC DOES NOT HAVE ANY EMERGENCY STATUTORY POWER TO RATION GAS DELIVERIES AMONG THE CUSTOMERS OF AN INTERSTATE PIPELINE BECAUSE OF A SYSTEM-WIDE OR NATIONWIDE GAS SUPPLY SHORTAGE

The FPC asserts that there is a "need for Commission authority to override the terms of the [direct sale] contract in times of emergency such as when a pipeline cannot meet its contractual commitment because of inadequate gas supplies."[15] The FPC also argues that its express statutory power to authorize abandonments under Section 7(b) of the Act is not sufficiently flexible to deal with temporary shortages of gas during a period of emergency,[16] although it pointedly ignores the possibility of a conditional abandonment which would permit resumption of full contract deliveries when the shortage ends. The thrust of the FPC's arguments, supported by United, is that this Court must broadly construe the Act in disregard of the deliberate and meticulous exclusion of direct sales from the scope of the agency's regulatory powers by Section 1(b) because a new and unforeseen situation has created an emergency. The State will demonstrate that Congress was fully aware of the

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[15] I.B. at 18.

[16] I.B. at 18-19, ftn. 15.

possibility of gas supply shortages when it enactedthe Natural Gas Act and has repeatedly refused the FPC's requests for express authority to deal with such emergency shortages.

The natural gas pipeline industry is completely dependent upon a depleting asset in finite supply. Congressional awareness of this circumstance is reflected in pivotal provisions of the Natural Gas Act designed to insure a dependable and uninterrupted supply of gas to the ultimate consumers served directly or indirectly by interstate pipelines.

Section 7(b) prohibits a partial or total abandonment of any facilities or service subject to FPC jurisdiction unless that agency authorizes such action, after application by the pipeline company, full evidentiary hearings and upon the basis of a specific finding that "... the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted" or that the public interest permits such abandonment. Both the FPC and the courts have held that this statutory protection encompasses a reduction in the volumetric quantities of gas delivered as well as a complete cessation of service *(Dixie Pipeline Co.*, 14 FPC 106, 114; *Panhandle Eastern Pipe Line Co.*, 22 FPC 679, 681 683-684; *Panhandle Eastern Pipe Line Co.*, 14 FPC 264 affirmed 236 F.2d 289 (CA.3); *Willmut Gas and Oil Co.*, v. *United Gas Pipe Line Co.*, 12 FPC 132, 138-139; *Panhandle Eastern Pipe Line Co.*, v. *Michigan Consolidated Gas Co.*, 177 F.2d 943, 945 (CA 6).

Section 7(a) authorizes the FPC to require extensions of pipeline transmission facilities to serve the needs of gas distributors in communities adjacent to such main lines but expressly prohibits any compulsory physical connection or sale of natural gas which would impair the pipeline's "... ability to render adequate service to its customers". The FPC has always insisted upon a showing that there are

adequate gas reserves firmly committed under contracts to support the construction and operation of any facilities or extentions sought to be certificated under Section 7(c)[17] and Section 157.14(a)(10) of the Regulations under the Natural Gas Act requires a comprehensive showing by the applicant to establish satisfactory gas reserve lines and deliverability volumes.

Both direct sale customers and resale customers of interstate pipelines have shown equal awareness of the need to protect themselves against the danger of a gas shortage in the event that their pipeline supplier improvidently assumes obligations to deliver firm gas in quantities exceeding either its gas supply or transmission capacity. Thus, direct sales contracts and resale tariffs invariably contain impairment of deliveries provisions establishing service priorities between different classes of customers and defining the respective rights and liabilities of the seller and buyer in the event of a failure to meet contractual delivery obligations.

Interstate pipelines differ from conventional public utilities because they are not legally obligated to meet service demands by potential new customers or to furnish additional service to existing customers. The Natural Gas Act leaves such companies free to choose their customers and to make voluntary business judgments concerning the expansion of their transmission capacity and the assumption of contract obligations to deliver additional volumes of gas.[18] Section 7(a) specifically withholds from the FPC the authority to compel the enlargement of transportation facil-

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17 *Trunkline Gas Co.*, 21 FPC 706; *Texas Illinois Natural Gas Pipeline Co.*, 24 FPC 980; *Tennessee Gas Transmission Co.*, 30 FPC 764.

18 *Panhandle Eastern Pipe Line Co.*, 204 F.2d 675, 680 (C.A. 3).

ities.[19] Pipeline transmission capacity and gas reserves has always been geared to the present and future needs of resale and direct sale customers.

These background considerations conclusively demonstrate that Congress intended interstate pipelines to have an absolute and unconditional obligation to meet their contract commitments to direct sale and resale customers and explain why it did not find it necessary to equip the FPC with express statutory powers to deal with the abnormal and extraordinary situation or either an individual pipeline with a systemwide gas shortage or with a nationwide gas shortage.

Congress was faced with a different situation in framing the statutory scheme of the Federal Power Act for the regulation of interstate electric utilities. Electricity is an intangible commodity whereas natural gas is a tangible commodity. Electrical energy cannot be stored whereas natural gas occurs in producing wells which are inherently storage facilities permitting withdrawal at known maximum deliverability rates. For these reasons, Congress specifically authorized the FPC to deal with emergency shortages of electrical energy in Part II of that Act. Section 202(c)[20] provides that during a war, or whenever the agency deter-

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[19] *Central West Utility Co. v. FPC*, 247 F.2d 306, 310-313 (CA 3).

[20] Section 202(c): During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation of transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by

(Cont. next page)

mines that an emergency exists by reason of a sudden increase in demands for electric energy or that there is a shortage of energy or of facilities or materials for its generation or transmission, the FPC shall require temporary connections of facilities and such other generation, delivery, interchange and transmission arrangements as well best meet the emergency needs and serve the public interest.

Section 202(d)[21] expressly exempts from FPC jurisdiction any temporary connections or facilities made or constructed to deal with such an emergency by an inter-

(20 Cont.)
order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party. (49 Stat. 849; 16 U.S.C. 824a (c)).

[21] Section 202(d): During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction; provided, that such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: Provided further, that upon approval of the Commission permanent connections for emergency use only may be made hereunder. (49 Stat. 849; 16 U.S.C. 824a(d)).

state electric utility. It also limits the duration of such temporary connections and construction to the period of emergency, and permits permanent connections for emergency use to be continued thereafter only upon specific approval by the FPC.

Congress delegated such express emergency authority to the FPC with respect to electric utilities on August 26, 1935. But, it failed to make any corresponding delegation of emergency authority in the Natural Gas Act enacted on June 21, 1938. *The State submits that this was not an oversight but a deliberate omission and attributable to Congressional awareness of the vital differences between the gas pipeline and electric utility industries.*

The FPC has long been aware that it lacked authority to deal with emergency situations arising from a shortage of natural gas. It repeatedly requested that the Natural Gas Act be amended "to provide specifically for control by the Commission of the end-use of natural gas when required for national defense or to safeguard the available supply" (31 FPC Ann. Rep. 145 (1951); 32 FPC Ann. Rep. 152 (1952) and 22 FPC Ann. Rep. 154 (1953)). For four years beginning in 1954, it requested narrower legislation "to provide specifically for control by the Commission of the allocation of natural gas when required for national defense or to safeguard the available supply in *emergency situations*" (Emphasis added). 34 FPC Ann. Rep. 170 (1954); 35 FPC Ann. Rep. 182 (1955); 36 FPC Ann. Rep. 18 (1956); 37 FPC Ann. Rep. 24 (1957); 38 FPC Ann. Rep. 16 (1958)). In January, 1970 the FPC again formally asked Congress to enact legislation granting it such emergency powers and this time it modeled the proposed legislation upon the pattern of the broad grant of authority to deal with a national emergency contained in Section 202 of the Federal Power Act. The FPC's Annual Report for 1970 summarizes this request:

"Spot shortages of natural gas which became apparent during the fiscal year and which are expected to to increase in the foreseeable future suggest urgent need for Congressional action to alleviate these problems and that the Commission's jurisdiction to do so should not be subject to challenge. This proposal which would add a new subsection to Section 7 of the Natural Gas Act would enable the Commission to determine when an emergency exists so as to require the construction of temporary connections of facilities and extensions of facilities and the delivery, interchange, transportation, *load curtailment and allocation of gas* by any gas company, whether or not it is otherwise subject to the Commission's jurisdiction. Undisputed authority to meet such crises as they arise is necessary for effective regulation of the natural gas industry (p. 8)." (Emphasis added).

These repeated and unsuccessful attempts to obtain explicit emergency powers caset grave doubt upon the FPC's present claims that it has plenary jurisdiction under its enabling Act to deal with the alleged nationwide gas supply emergency or with United's systemwide gas shortage.

The only provision of the Natural Gas Act granting emergency powers is the portion of 7(c)[22] which applies

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[22] Section 7(c): Provided, however, that the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

only to the limited situation where issuance of a temporary certificate, without notice or hearing, to a pipeline is necessary "to assure maintenance of adequate service to to serve particular customers" during the pendency of hearings. Such emergency authority cannot be utilized to impair adequate service or terminate service to particular customers under curtailment plans. This specific and limited authorization negates the FPC's effort to imply much broader and wholly different emergency powers which were requested from, but denied by, Congress.

In any event, the FPC's efforts to characterize the curtailment plans of United and other pipelines as attempts to deal with an emergency situation are inaccurate and misleading. Neither United nor such other pipelines have proposed that the reduction in contract delivery volumes be effective for only a specified and limited period of time. Rather, these pipelines have requested both thier direct sale and resale customers to execute new long term contracts permanently reducing their present delivery entitlements.

B. THE FPC HAS NO STATUTORY POWER TO CHANGE THE TERMS OF DIRECT SALE CONTRACTS GOVERNING DELIVERIES OF GAS DURING SHORTAGES

The impairment of deliveries provisions in direct sale contracts are "terms" governing the service provided in the event of a gas shortage. The FPC cannot abrogate and nullify these contract terms concerning the liabilities and rights of the pipeline and its direct customers merely because the contingency to which they are drawn has materialized. Any effort by this agency to regulate such matters is a direct and prohibited assertion of power over direct sales.

Both the FPC[23] and United[24] admit that the agency lacks rate jurisdiction over direct industrial sales. Nevertheless, the FPC's Order No. 431[25] required United to file a plan providing for the curtailment of direct sales in the form of new and amended tariff sheets which become effective, under the provisions of Section 4(e) of the Act, during the pendency of an investigation of the reasonableness and lawfulness of such plans. *Thus, despite its disclaimer of rate and tariff jurisdiction over direct sales, the FPC is changing the terms of direct sale contracts.* This clearly violates the express prohibition of Section 1(b) which excludes from the regulatory powers of the FPC any *regulation of sales for consumptive use.*

The FPC plainly lacks the authority to require a pipeline to file a tariff covering the price and terms of a direct sale because this would give it the continuing rate and service jurisdiction it exercises over *sales for resale* as opposed to the *initial* certification jurisdiction it has over *transportation.* An attempt by a divided FPC to require a pipeline to file a tariff applicable to direct sales contracts in order to obtain such continuing sales jurisdiction was found unlawful in *Colorado Interstate Gas Co.* v. *FPC,* 185 F.2d 357 359, 360 (CA 3), where the court stated:

> "The power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress has conferred upon the Commission that body is without authority to compel Colorado

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[23] I.B. 22.

[24] I.B. 9.

[25] 36 Fed. Reg. 7505, FPC I.B., pp. 50-54.

> Interstate to make its gas tariff applicable to any sales other than those for resale. *It is beyond the power of the Commission to require a natural gas company within its jurisdiction to make its tariff applicable to sales which are not within the regulatory power of the Commission for this would be in effect to regulate such sales.* Indeed, the Commission itself recognized this in 1945 when in accepting Colorado interstate's earlier tariff changes for filing it specified that they were to be effective only for sales 'for resale for ultimate public consumption'." (Emphasis Added).

The FPC also cannot amend an interstate pipeline's filed rate tariffs to compel continued deliveries of gas under a resale rate schedule for the purpose of permitting the purchaser to divert such volumes from resale channels to direct consumptive use in a power plant. In *City of Hastings, Nebrasks v. FPC*, 221 F.2d 31, 32-33, 36-39 (CADC cert. denied, 349 U.S. 920) the court held such action beyond the scope of the FPC's statutory powers as a prohibited regulation of a direct sale, stating:

> "In effect, the Commission says when the City cancelled its contract for power plant gas, it put itself into the position of having no no contract for, and no right to; power plant gas, *and the Commission is unable to write a new contract for the parties. The Commission says it may not, because it cannot, although it has recommended to Congress that it be given authority to, regulate sales not now governed by the statute.* It therefore concludes that the complaint must be dismissed." (Emphasis Added).

As the District of Columbia Court of Appeals observed in *City of Hastings*, cited *supra*, p. 12, the FPC had re-

quested authority to regulate direct sales before 1954. Again, in 1963, the FPC recognized its lack of statutory authority to regulate either the rates or terms of direct industrial sales and asked Congress for such legislative authority:

> "At the time the Natural Gas Act was adopted in 1938, it was not believed that Commission regulation of the *rates and terms* of such sales was necessary to protect the purchasers from *discrimination* or unduly high rates, *or that such sales could have any adverse effect upon jurisdictional sales for resale.* Both of these views have provedn to be incorrect in a significant number of situations. Thus, while the Commission is not suggesting that this type of sale if inherently improper or should be generally prohibited – on the contrary, in many situations they have been shown to be mutually beneficial to all interested parties – it is believed that bringing such sales within the range of Commission regulations would materially enhance the effectiveness of Commission regulation of natural gas in the public interest. (1963 FPC Annual Report, pp. 405). (Emphasis Added).

The FPC justified the proposed legislation by reference to the freedom of interstate pipelines under the Natural Gas Act to engage in discriminatory practices, respecting service, by preferring industrial consumers they served directly to industrial consumers served by their resale customers and by diverting natural gas from superior domestic use to industrial use.(Appendix N,14a-21a). In a letter dated June 12, 1963, from then FPC Chairman Joseph C. Swidler to President of the Senate Lyndon P. Johnson; the FPC stated:

> "Under existing law the Commission's au-

thority is limited to sales for resale in interstate commerce: hence, *the price and other terms* of a direct sale by a pipeline to an industrial consumer *are outside the sphere of this Commission's regulatory authority.*

"... the Commission strongly recommends that it be given jurisdiction over direct industrial sales by natural gas companies. This authority will enable the Commission to require that interstate industrial gas sales will be made at such prices *and on such terms* as to realize the potential benefits of such sales to both industrial and domestic consumers." (Cong. Rec. 11084, 11085). (Emphasis Added).

The FPC cannot cite a single agency decision, whether or not litigated in the courts, in which it has changed either the price or any term in a direct sale contract authorizing the interstate transportation of natural gas under a permanent certificate of public convenience and necessity.

C. THE RATE AND TARIFF SECTIONS OF THE ACT GRANT THE FPC LIMITED, NOT PLENARY, POWER OVER SERVICE AND APPLY ONLY TO RESALE CUSTOMERS

The FPC claims plenary authority to approve or prescribe "curtailment plans" which allocate reduced gas delivery volumes to both the direct sale and resale customers of an interstate pipeline in derogation of its contract and certificate obligations. Its exercise of such authority, which is asserted for the first time in its history, will have drastic and far-reaching consequences.

The FPC proposes to obliterate judicially sanctioned differences in treatment between existing and new customers and the universally recognized service priorities of firm

over interruptible customers. It has accepted for filing, and permitted to become effective pending a determination on the merits, the curtailment plans of United and of other pipelines which reduce gas deliveries to direct sales customers and reallocate such gas volumes to resale customers. Such curtailment plans are effective as to both *present* and *potential* gas shortages. While asserting an urgent need for such plenary authority to deal with a nationwide gas supply shortage, the FPC has permitted curtailments by pipelines who are not experiencing such a shortage but have elected to fail to proivde additional transmission capacity needed to meet firm contract obligations to existing customers because of the additional risk of investing in new or enlarged facilities when there is a possibility that potential future shortages will diminish profit margins.[26]

Furthermore, the FPC has made manifest its intention to insure that pipeline rates and charges for direct sale and resale service will be "fully compensatory" and thus provide financial incentive to encourage exploration for and development of new gas reserves.[27] The State submits that gas allocation proceedings are not the proper vehicle for dealing with this problem and that the alleged emergency is being used as a pretext to circumvent the limited powers of the FPC to relieve United of financial obligations to direct sale customers[28] which were profitable but no longer pro-

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26 *Order Suspending Proposed Tariff Sheets*, etc., p. 4, issued August 5, 1971 in El Paso Natural Gas Company, Docket RP 72-6: Sec. 11.3 Curtailment Procedures, El Paso Natural Gas Co., FPC Gas Tariff, issued July 2, 1971.

27 Opinion 606, FPC Pet. 70a; *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, F.2d (CA 5), January 14, 1972, I.d. at 7a.

28 See Discussion, *infra* at p. 56.

vide as great a profit as that pipeline can earn by diverting the gas volumes from those customers who purchased under low price, long term contracts to reslae customers who must pay substantially higher and continuously escalating prices under rates fixed by the FPC.

No provision of the Act grants the FPC any authority to override and supersede all existing contracts between a pipeline and its direct sale and resale customers, as well as the certificate obligations of such pipelines. The term "curtailments" is alien to the Act, as is the concept of "plenary jurisdiction" over the gas delivery obligations of pipelines. The FPC is seeking to improve the Act, from its standpoint, by inducing this Court to accept a strained and tenuous interpretation of statutory provisions which deliberately denied it any authority over the prices and terms of direct sale service and only limited authority of the type sought to be exercised over resale service.

Sections 4 and 5 of the Act authorize the regulation of *service* and well as of *rates*. The prohibitions of Section 4(b) against the action of a natural gas company in according any undue preference or advantage to one resale customer over another or in maintaining any unreasonable difference as between localities or classes of service has been held applicable to the allocation of inadequate mainline transmission capacity, of an interstate pipeline, among its resale customers (*Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.22d 784, 789 (CA 6); *Michigan Consolidated Gas Co.* v. *FPC*, 203 F.2d 895, 901 (CA 3); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F.2d 675, 679 (CA 3)). But, the FPC can only invoke its authority under these sections upon a finding that the pipeline's service priorities are unduly preferential or discriminatory since its authority to regulate service is based upon the implementation of the statutory objective of

remedying such unlawful practices (*Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, cited *supra*, at 789).

The FPC itself has recognized these limitations upon its powers to control and limit gas delivery volumes in the only case in which it has ever exercised such authority, *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196, 197, 203, 204, and a series of related cases all involving the same parties and a single interstate pipeline. These cases are distinguishable in several vital respects. They related to a shortage of pipeline transmission capacity rather than to a gas supply shortage. The reduced gas volume allocations were made effective by FPC orders only with respect to Panhandle's resale customers, gas distributors and other interstate pipelines. Panhandle's contracts with these jurisdictional resale customers were filed with the FPC as rate schedules under Section 4(c) of the Act but did not contain "any provisions respecting curtailment of firm service when demands on the pipeline system exceed its delivery capacity." (at 202) No party ever challenged in court the validity of the Emergency Service Rules and Regulations prescribed by the FPC which were of limited duration. The rights of firm direct sale customers were neither at issue nor affected in such cases. None of these circumstances are present here.

An analysis of the structure of Sections 4 and 5 clearly reveals that the FPC's rate and service powers can be exercised only with respect to gas delivered by an interstate pipeline to a resale customer. Each of the operative paragraphs of Section 4 and of Section 5 repeats the express limitation of the powers thereby granted to the "transportation or sale of natural gas subject to the jurisdiction of the Commission" for the purpose of excluding therefrom the matters expressly exempted from the coverage of the Act by Section 1(b). These include sales not for

resale, i.e., any direct sale of gas to be consumed by the purchaser. To read the word "transportation" in this limiting clause as conferring upon the FPC under Sections 4 and 5, the very powers over the prices and terms of direct sales excluded by Section 1(b) and again excluded by the incorporation of such limited clauses in each of such sections would nullify and subvert the clear intention of Congress (*FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 499, 503, 508). Yet the FPC and United request such a construction by this Court.

Section 4(a) requires all *resale* rates and charges, and rules and regulations affecting them, to be just and reasonable. Section 4(b) prohibits any natural gas company, with respect to any *resale* rate or service, from subjecting any person to any undue prejudice or disadvantage and from maintaining any unreasonable difference in rates, service, facilities or in any other respect between localities or classes of such service. Section 4(c) requires the filing, in the form of tariffs, of schedules embodying all *resale* rates, classifications, practices and regulations affecting such rates, together with all contracts affecting such matters. Section 4(d) requires the filing, on thirty days notice, of tariffs proposing changes in such *resale* rates and services. Section 4(e) provides for hearings, upon complaint or on the FPC's own initiative, concerning the lawfulness of such *resale* rates, classifications or service. Section 5(a) authorizes the FPC when it finds that any *resale* rate of classification, or any regulation, practice, or contract affecting such rate or classification is unjust, unreasonable, unduly discriminatory or preferential to prescribe the lawful rate or service to be thereafter effective.

These considerations based upon the plain text of the Act establish that the limited powers of the FPC to regulate service for the purpose of preventing discrimination or preference can only be exercised with respect to gas sold

for resale. The Court of Appeals for the Seventh Circuit reached the same conclusion in *Fuels Research Council, Inc.* v. *FPC*, 374 F.2d 842, 852-853. That decision construed the term "persons" in Section 4(b)(1) and the powers of the FPC to change unduly discriminatory or perferential rate designs under Section 5(a) to be limited in scope to resale rates affecting gas distributors and the ultimate consumers purchasing from them.

D. THE FPC HAS NO STATUTORY POWER OVER DISCRIMINATION IN SERVICE BETWEEN DIRECT AND RESALE CUSTOMERS

The FPC's only authority to prevent undue and unlawful discrimination or preference derives from Sections 4 and 5 of the Act. The FPC[29] and United[30] contend that if direct sale customers obtain gas for industrial purposes, while resale customers requiring gas for ultimate consumption by domestic end-users are curtailed, there will be an undue preference to the former class of service. They argue from this premise that the Court of Appeals holding that the FPC lacks curtailment jurisdiction over direct sales in inconsistent with, and undermines, the agency's jurisdiction under Sections 4 and 5. This argument erroneously assumes that the rate, service and tariff provisions of the Act are designed for the mutual and reciprocal protection of direct sale and resale customers. It further erroneously assumes that the FPC has been invested by Congress with authority to control and regulate, in rate proceedings, the end-use of gas by different classes of ultimate consumers.

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[29] Pet. 18-19.

[30] I.B. at 15.

As already established, Sections 4 and 5 encompass only the protection and regulation by the FPC of resale customers. Furthermore, the FPC lacks statutory authority to consider the end-use of gas or conservation factors in proceedings under Sections 4 and 5 (*FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 608-614; *Fuels Research Council, Inc.* v. *FPC*, 374 F.2d 842, 853-854 (CA 7); *City of Detroit* v. *FPC*, 230 F.2d 810, 816-817 (CADC)). The claim of discrimination against resale customers is based solely on the unfounded assumption that the FPC is authorized to establish service priorities, regulating different classes of end-use by ultimate consumers, in the exercise of its rate and tariff jurisdiction. Thus, the alleged discrimination is wholly beyond the statutory powers of this agency.

The FPC[31] and United rely upon a *dictum* in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, 647, to support the thesis that direct sales contracts are within the scope of its Section 5(a) powers to prevent discrimination and preference. But, *Panhandle* did not present any issue as to the agency's powers to nullify or vary either the price or terms of such contracts. It decided only that the FPC did not abuse its administrative discretion by allocating excess earnings or the combined jurisdictional and nonjurisdictional business of an interstate pipeline to its regulated resale business. This Court noted that Panhandle earned more than a 200 percent profit on its industrial sales and held:

> "It is a fairly obvious indication that the regulated business is being saddled with costs which in fairness should be borne by direct industrial sales. That is an extremely relevant consideration for the Commission to take into ac-

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[31] I.B., ftn. 19a at 22.

> count when it determines what costs are fairly attributable to each business and what the resultant rate for the wholesale business should be. *Section 5(a) does not of course give the Commission authority to disregard the jurisdictional lines which Congress has drawn between interstate wholesale sales and direct industrial sales so as to level the profits between the two classes of business.*" (At 647). (Emphasis Added).

Clearly, the decision recognized that the FPC could not eliminate *price discrimination* between resale and direct sale customers. *A fortiori*, it cannot remedy *service discrimination* between these two classes of customers because Section 5(a) cannot possibly be construed as granting greater powers over practices or contracts *which do not*, than over those *which do, affect* a jurisdictional resale "rate, charge, or classification".[32] Allocation or assignment of the regulated portion of a pipeline's total business clearly and directly affects jurisdictional resale rates. Reduction of gas delivery obligations by allocations under curtailment plans have no such impact.

The FPC itself has recognized that it lacks necessary statutory authority to remedy undue preference and discrimination between different direct sale customers or between localities, caused by either unequal rate levels or

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[32] This Court's statement that direct sales contracts are within Section 5(a) specifically referred to the statutory language that "... whenever the Commission 'shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, *or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate.*'" (p. 647) (Emphasis original).

by curtailment practices concerning interruptible direct customers (*Coastal Transmission Corp.*, 26 FPC 318, 324-325).

E. THE FPC LACKS STATUTORY POWER TO REALLOCATE GAS SUPPLIES FROM DIRECT SALE CUSTOMERS TO RESALE CUSTOMERS

The FPC claims plenary jurisdiction, by virtue of its authority over the interstate transportation of natural gas, to reallocate gas supplies between direct sale and resale customers and also to control the end-use of natural gas by ultimate consumers. As already demonstrated, such powers cannot be derived from Sections 4 and 5. They are not expressly conferred by any section of the Act and could only be implied under the certificate provisions of the Act, Section 7. That section authorizes, by issuance of a certificate of public convenience and necessity, the regulation of any transportation or natural gas in interstate commerce utilizing the facilities of a pipeline. It provides the statutory vehicle for authorizing the dedication of a natural gas supply to interstate movement and the installation of any new or improved facilities used to transport such gas, either on a transportation service for hire basis or on a sale for resale basis.

In determining whether the public convenience and necessity requires the issuance of a certificate, the FPC must consider all aspects of the proposed use of interstate transportation facilities in order to decide whether the granting of the requested authorization will impair the pipeline's ability to continue adequate service to its existing customers, including those purchasing under direct sale contracts. When the proposed use of facilities, and the service to be rendered thereby, involve a direct sale to industrial consumers the FPC may initially certificate facilities used for the "transportation" of gas although the "sale" of such

gas is beyond its regulatory powers (*FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1; *Panhandle Eastern Pipe Line Co.* v. *FPC*, 359 F.2d 675, 682 (CA 8); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F.2d 467 (CA 3), cert. denied, 352 U.S. 891; *Coastal Transmission Corp.*, 26 FPC 318, 324).

Such certificate jurisdiction does not involve any regulation of the price or other terms of a direct sale or represent an assertion of jurisdiction over the purchaser. In the framework of initial certification, transportation and sale are separate subjects of regulation. But, this indirect and limited jurisdiction does not detract from the force and scope of the complete exclusion of direct sales from the regulatory powers of the FPC in other situations and under other sections of the Act, such as Sections 4 and 5. As this Court held, in *Transcontinental*, cited *supra* at 4, a direct sale "... *is not subject to the Commission's jurisdiction except insofar as Section 7 requires the Commission to certificate the transportation of gas pursuant to the sale.*" (Emphasis Added).

In any event, the FPC's powers under Section 7 are limited in nature and fall far short of the complete allocation power it claims to divert gas supplies from direct sale industrial use to resale domestic and commercial use. *Transcontinental*, cited *supra* at 17, decided that "... the Commission's powers under Section 7 are, by definition, limited ..."; it "... cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification". That case further held that the FPC was not empowered to allocate gas to specific end-uses stating: "... it is clear that the Commission fully realized the distinction between the [limited] power it enjoys under Section 7 and complete allocation power" (at 18-19).

In arriving at this conclusion, careful consideration was given to an abortive attempt to amend the Act by declaring a national policy that the public interest required the promotion of national defense and conservation of gas reserves for those uses affording the highest social benefits to the public (H.R. 982, 1949). The FPC had opposed this bill because much of the gas sold for industrial uses was consumed within producing states and could not be subjected to its regulatory control. This Court also recognized that the Act deliberately and meticulously invested the FPC with only limited authority short of the reach of federal constitutional power over interstate commerce, and left the residue including regulation of direct sales to the states, citing *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507 (*Transcontinental, cited supra,* at 8).

In the light of these considerations, this Court concluded that the FPC lacked power to prohibit by a uniform rule direct sales for use as boiler fuel (365 U.S. 16-17). However, although the FPC cannot directly control and regulate end-use in a Section 7 proceeding, it can consider proposed uses of gas sold under direct sale contracts as one relevant factor, among all other such factors, in determining whether to certificate a proposed sale.

Applying the same rationale it also concluded that Section 1(b) prohibits any effort "... to bar direct sales absolutely, thus forcing all gas transactions into regulated [resale] channels" although the FPC could give such limited consideration and weight to the impact of a proposed direct sale price on prices payable by resale customers (365 U.S. 23-24).

To summarize, Congress left the regulatory authority of the states intact and undiminished with respect to all aspects of direct sales made by interstate pipelines except for the initial certification of such sales by the FPC; de-

clined to incorporate in the Act a national policy preferring certain end-uses of this limited natural resource; denied the FPC power to allocate either the national supply or the interstate supply of natural gas to different classes of end-use by ultimate consumers and prohibited any effort by the FPC to channel gas supplies to resale customers of interstate pipelines by barring sales to direct industrial consumers.

In *Granite City Steel Co.* v. *FPC*, 320 F.2d 711, 713 (C.A.D.C.) an attempt by the FPC to reallocate mainline transmission capacity of an interstate pipeline in excess of its delivery commitments to firm customers from direct sale industrial users to resale customers was held unlawful under Section 7(a) because it would impair the pipeline's ability to render adequate service of its existing customers. The rationale of the decision rejected the FPC's claim that it could control the end use of gas and give priority to domestic and commercial users[33] on the basis that:

> *"The theory and purpose of the statutory restriction of 7(a) appear to be that persons desiring gas for the first time, or desiring more gas, should not get it by taking it away from existing lawful customers. We think Mississippi's service to its industrial customers will not be "adequate" within the meaning of Section 7(a) unless it meets their present and reasonably foreseeable requirements approximately as well as the service Mississippi has been furnishing them.* This is no less true because Mississippi has contracted

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[33] In *Arkansas-Louisiana Gas Co. et al.*, 27 FPC 697, 703, the agency found, under Section 7(a), that it was in the public interest for the pipeline to supply additional capacity to its resale customers and also found under Sectional 5(a) that its "practice or contract" respecting allocation of capacity to direct industrial customers was "unduly discriminatory or preferential" against resale customers.

to supply the full requirements of many utility customers while its contracts with industrial customers contain no full-requirements clause and are subject to cancellation on six months notice." (at 713) (Emphasis added).

Clearly, the FPC cannot *permanently* reallocate gas volumes from direct sale to resale customers by prohibiting industrial end-use of such gas. Since it lacks special emergency power to deal with a gas shortage, it is acting outside the scope of its statutory authority in taking such action to relieve United of its delivery obligations for an alleged *temporary* period.

F. SECTION 1(b) DOES NOT GRANT ANY SUBSTANTIVE POWER AND CANNOT BE COMBINED WITH SECTIONS 4, 5 AND 16 TO CREATE IMPLIED POWER TO REALLOCATE GAS SUPPLIES

The FPC claims power to reallocate gas supply volumes from direct sale to resale customers on the novel and unprecedented theory that it has *concurrent* and *coextensive* jurisdiction over interstate *transportation* and *sales for resale* under Section 1(b). This reading of the Act is designed to evade the prohibition in the very same section against regulation of any aspect of the prices and terms of direct sales. It is the keystone of the FPC's attempt to nullify and supersede the impairment of delivery terms of direct sale contracts without invoking its rate, service and tariff powers which are admittedly limited to sales for resale. This is an argument that the FPC can achieve indirectly what Congress has prohibited it to do directly.[34]

[34] The agency recognized this limitation on its jurisdiction in the context of construction of its powers under the unusually broad standard of "public convenience and necessity" in *Panhandle Eastern Pipe Line Co.*, 15 FPC 46, 57-59, aff'd. *Central West Utility Co. v. FPC*, 247 F.2d 306, 312 (CA 3).

Section 1(b) is not a grant of any substantive power. Rather, it is a mere definition of the scope of the regulatory powers conferred by the Act which is cast in terms of the types of transportation and sale transactions Congress committed to federal regulation and reserved to state regulation. Direct sales for consumptive use were deliberately and unmistakably exempted from the authority granted the FPC in each and every section of the Act (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 334-336). Section 1(b) is not self-executing. Each of the substantive sections of the Act empowers the FPC to regulate a different subject and the individual powers, thereby conferred must be exercised in accordance with the specific procedures prescribed by Congress.

Furthermore, in implementing its powers under any section of the Act, the FPC cannot claim implied power which was expressly withheld in another section of the Act. Thus, in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F.2d 675, 679-680 (CA 3), an attempt, under Sections 4(b) and 5(a), to eliminate unduly discriminatory and preferential practices in a pipeline's allocation of its transmission mainline delivery capacity to different resale customers by ordering a compulsory enlargement of such facilities in disregard of the prohibition against such action, in Section 7(a), was held unlawful.[35] The FPC's claim that Section 1(b) grants powers which can be implemented under the tariff revision procedures prescribed in 4(d) and 4(e) for

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35. Furthermore, the FPC may not rely on Section 4(b) to override this prohibition of Section 7(a) even when exercising its certificate powers (*Panhandle Eastern Pipe Line Co. v. FPC*, 247 F.2d 306, 310-313 (CA 3).

changing resale rates, practices and contracts although the latter sections may not be applied to direct sales clearly runs afoul of this legal doctrine. This Court has specifically condemned an attempt by the FPC to combine different sections of the Act by the purpose of circumventing explicit limitations imposed by Congress.

In a completely parallel situation presented in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 499, 504, 507-508, the agency claimed jurisdiction over a transfer of undeveloped gas reserves owned by an interstate pipeline to its production affiliate which sold the gas in intrastate commerce. The FPC was unable to base its claim of statutory authority on any express provision of the Act and was confronted with a specific exemption in Section 1(b), concerning production or gathering. It sought a narrow interpretation of that exemption and combined several separate sections of the Act to lay the foundation for implied authority necessary to protect granted statutory functions and objectives. It claimed authority under Section 1(b) broad enough to neutralize the specific exemption and also invoked Section 16 to counterbalance that prohibition. Finally, it justified the requested broad construction on the need to avoid a gap impairing the comprehensive regulatory scheme established by the Act. In all of these respects, the arguments presented to this Court were the same as those pressed here. This Court completely and squarely rejected each of these arguments, for reasons which are equally compelling and controlling in this case:

> "The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities, such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act. In support of this position it is pointed out that the

section spefifically exempts both the local distribution and the facilities used therefor while it makes no mention of the facilities used for production or gathering. *In the face of the unambiguous language of the Act and its legislative background, we cannot ascribe such a narrow meaning to the words, 'the production or gathering of natural gas.'* . . .

The Commission urges it has jurisdiction over the transaction between Panhandle and Hugoton from the powers granted to it by Section 7(c) of the Act, 15 USCA Section 717 f (c), 4 FCA title 15, Section 717 F (c), which authorizes it to issue certificates of convenience and necessity for the interstate trnasportation and sale of natural gas and those granted to it by Sections 4 and 5, 15 USCA Sections 717c, and 717d, 4 FCA title 15, Sections 717c and 717d, to determine reasonable rates for such transportation and sale. It is pointed out that Panhandle in three applications for certificates of convenience and necessity to construct additional pipe-line facilities had included the acreage here involved as part of its gas reserves, and certificates were issued upon the finding by the Commission that Panhandle had adequate reserves to warrant its expansion. Moreover Panhandle had been permitted to include these reserves in its rate base as 'used and useful property.' The Commission, therefore, argues that these gas leaves which Panhandle proposes to grant to Hugoton have been dedicated to the discharge of Panhandle's public-utility obligation to render adequate service at reasonable and nondiscriminatory rates. *From these circumstances, 'the Commission concludes*

that these leases cannot be relinquished by Panhandle without the consent of the Commission which has the implied power to protect its rate-making function and to insure the maintenance of adequate service by a natural-gas company. Sections 4, 5 and 7 do not concern the producing or gathering of natural gas; rather they have reference to the interstate sale and transportation of gas and are so limited by their express terms. Thus Sections 4(a), (b), (c), 5(a) and 7(c) speak of 'transportation or sale of natural gas subject to the jurisdiction of the Commission' while Section 7(a) and (b) refer respectively to 'transportation facilities' and 'facilities subject to the jurisdiction of the Commission.' *Nothing in the sections indicate that the power given to the Commission over natural gas companies by Section 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power the Commission to the constitutional limit of congressional authority over commerce. The repetition of the words 'subject of the jurisdiction' makes clear to us the intent to keep the Commission's hands out of the excepted local matters. The same answer applies to petitioner's argument that Section 16, 15 USCA Section 717o, 4 FCA title 15, Section 717o; gives it authority to stop sales of leases. The power to do the things appropriate to carry out the provisions of the Act can hardly be taken to rescind a prohibition against certain actions. . . .*

To accept these arguments springing from power to allow interstate service, fix rates, and control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of

the forbidden area.[14] It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress . . . .

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[14] Would it soon be contended that statutory power to require extension of service, Section 7(a), included power to require exploration or acquisition of leases or *allocation of production to interstate pipe lines* in order to serve the public interest?

Note:
Other footnotes omitted and Emphasis Added.

There is no merit to the FPC's claim that Section 16 authorizes it to utilize the procedures prescribed in the rate sections to implement transportation authority granted, if al all, only by Section 7. Nor can that section be used to enlarge authority withheld by the Act since its sole function is to implement powers specifically granted (*Murphy Oil Corp.* v. *FPC*, 431 F.2d 805 (CA 8); *Willmut Gas & Oil Co.* v. *FPC*, 294 F.2d 245, 249-250 (CADC); *Niagra Mohawk Power Corp.* v. *FPC*, 379 F.2d 153, 158 (CADC)). Finally, as this Court held in *Panhandle*, Section 16 can never be utilized to circumvent and evade an express prohibition against the exercise of jurisdiction, in this case, regulation of the terms of direct sale contracts.

G. THE FPC DOES NOT HAVE COEXTENSIVE AND CONCURRENT POWER OVER TRANSPORTATION AND SALE UNDER THE CERTIFICATE AND RATE SECTIONS OF THE ACT

Section 7 is the only provision in the the Act which authorizes the regulation of the transportation facilities of a

natural gas company or of the service thereby rendered.[36] It is both complete and comprehensive and expressly grants authority to control and supervise extensions or improvements of such facilities; their abandonment; the issuance and terms and conditions of certificates and the acquisition of pipeline right-of-ways by eminent domain proceedings. The FPC's claim that Congress intended the mere definitions in Section 1(b) to override and supersede these specific provisions granting its only express powers to regulate the interstate transportation of natural gas defies credibility.

The FPC[37] construe the incorporation, in Sections 4 and 5 of the Act, of the limitations upon its jurisdiction set forth in Section 1(b) as evidence of an intention to authorize the exercise of "transportation" authority under these rate and tariff provisions. To read the word "transportation" in this limiting clause as conferring upon the FPC under those sections the very power to regulate the prices and terms of direct sales deliberately excluded by Section 1(b) and again excluded by the express recital that the powers of the FPC under Section 4 and 5 are limited to ". . . the transportation or sale of natural gas subject to the jurisdiction of the Commission. . ." would nullify and subvert the clear and plainly expressed intent of Congress. *In the context of rate and tariff regulation, the FPC's powers are restricted to the regulation of rates and the elimination of preferences and discrimination in connection with the*

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[36] Neither the FPC nor United can invoke such certificate authority in the absence of an application under Section 7(b) or 7(c), the statutory hearings required as a prerequisite to the exercise of such authority and express findings that the granting of a certificate will serve the public convenience and necessity. (*United Gas Pipe Line Co. v. FPC*, 385 U.S. 83, 91).

[37] I.B. at 34.

interstate transportation of gas owned by others and the interstate sale of gas for resale.

Furthermore, the FPC's assertion of coextensive and concurrent jurisdiction over the transportation and sale of natural gas under the certificate and rate sections of the Act ignores both the interplay between those sections and the structure of the Act. Section 7 is the statutory vehicle for initially dedicating natural gas supplies to interstate movement and for initially authorizing the use of pipeline facilities for the interstate transportation or sale of such gas supplies. The powers granted to the FPC in Sections 4 and 5 only become operative after such initial certification of natural gas in interstate commerce by means of a permanent certificate. Before the issuance of such a certificate, the FPC can regulate rates by attaching appropriate conditions under Section 7(e). Thereafter, it can correct an excessive or discriminatory rate only by proceedings under Section 4, initiated by company rate filings, or under Section 5, initiated by its action in instituting a rate investigation. *(376 U.S. 515, 519-524). Consequently, the FPC can exercise its statutory authority over the transportation of natural gas in interstate commerce only under the certificate section of the Act and cannot claim such authority under the rate and tariff sections of the Act.* These legal considerations fully and plainly negate its claim that it may reallocate gas supply volumes from direct sale to resale customers by virtue of its "transportation" authority under Sections 4 and 5.

The FPC's contention that it has coextensive and concurrent jurisdiction over transportation and sales for resale under the certificate and rate sections of the Act was specifically rejected in *United Gas Pipe Line Co. v. FPC*, 388 F.2d 385, 388 (CA 5). In that case, the issue was the proper application of the agency's formula for allocating consolidated tax return savings between affiliated regulated

and unregulated companies joining in a single return. Its formula involved three distinct steps: separation of the companies into regulated and unregulated groups; determination of the net aggregate taxable income of each group and apportionment of the total consolidated tax between the two groups, and among companies in the regulated group, on the basis of their respective taxable incomes. The FPC classified the pipeline as a completely regulated company although 45% of its income was derived from jurisdictional sales for resale, 10% from nonjurisdictional sales for resale regulated by state commissions and 45% from nonjurisdictional direct sales not regulated by any agency. The FPC justified its classification of such direct sales as regulated business activities on the ground that they were "... subject to the Commission's *certificate jurisdiction with respect to transportation*." (Emphasis Added). The Court of Appeals flatly repudiated this theory because:

> ... The Commission's certificate jurisdiction is not the same as its rate jurisdiction and the Commission's judgment in this respect is invalid since this is a rate case which we are considering and regulation here is *rate* regulation. (Emphasis Original).

The State submits that these considerations conclusively establish that the FPC does not have coextensive and continuing jurisdiction over the interstate transportation and sale of gas under the certificate and rate sections of the Act.

Assuming, for the sake of argument, that it had such jurisdiction the claimed power to reallocate gas supply volumes could only be exercised if such transportation authority is of a *continuing nature*. Stated otherwise, if such transportation authority is exhausted and terminated

by the issuance of a permanent certificate authorizing the use of interstate pipeline facilities to transport gas to direct sale customers, the FPC clearly lacks any statutory authority "... to regulate the *volumes* of gas transported for direct sale."[38] This was the rationale of Opinion No. 606 and the heart of its claim that curtailments do not relate to *rates* but to *transportation.* The FPC's arguments to the Court of Appeals in this case were based principally on this continuing transportation jurisdiction theory. In its arguments to this Court, the FPC has completely abandoned its reliance on Section 7 of the Act and seeks to conceal and deemphasize the total dependence of its alleged plenary jurisdiction over pipeline curtailment plans on such continuing transportation jurisdiction. The State submits that this reversal of position is caused by the FPC's belated realization that its certificate powers end upon the issuance of a permanent certificate which, as already established, do not permit reallocation of gas supplies.

The Natural Gas Act does not expressly confer upon the FPC the authority to change an issued and effective certificate of public convenience and necessity. The absence of such an express provision gains significance from the explicit delegation by Congress to the Civil Aeronautics Board of power to "alter, amend, modify or suspend any such certificate, in whole or in part, if the public convenience and necessity so require..."[39] It is hornbook law that an administrative agency cannot alter or amend a previously issued permanent certificate in order to implement a changed regulatory policy unless its enabling act specifically provides for modification or revocation of such certificates (*United States v. Seatrain Lines,* 329 U.S. 424, 428-432; *American Trucking Association v. Frisco Co.,* 358 U.S. 133,

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[38] Sol. Gen. Pet. at 57a.

[39] 49 U.S.C.A., Sec. 1371.

146; *Watson Bros. Transportation Co. v. United States*, 132 F. Supp. 905 (D.C. Neb.) aff'd. 350 U.S. 927). The FPC's reallocation of gas supplies is such a change in policy.

Nor may an agency condition a certificate by reserving the power to attach such terms, conditions and limitations as it may later deem appropriate in order to deprive the licensee of previously granted substantive rights (*United States v. Seatrain Lines, Inc.*, 329 U.S. 424; *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316, 321). Section 16 which grants the FPC power to "rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act" does not include "certificates" (*United States v. Seatrain Lines, Inc.*, cited *supra*, at 432). The FPC is unable to cite a single instance in which it has either vacated or modified a permanent and unconditioned certificate which has become effective. On the contrary, it has conceded the applicability of the Seatrain Lines doctrine where the natural gas company has relied upon the issuance of a permanent certificate (*Turnbull & Zoch Drilling Co., Operator*, 26 FPC 678, 680).

The FPC[40] and United[41] rely upon a mere *dictum*, taken out of context and incorrectly construed, in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, cited *supra* at 523. This is the sole support for their clearly erroneous view that the statutory grant of authority over "transportation" authorizes the reallocation of direct sale gas supply volumes to resale customers. Fundamental questions of jurisdiction must be based on an informed and sound interpretation of the agency's enabling Act rather than on isolated fragments of superfluous language in an opinion. As this Court stated in *United Gas*

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40 I.B. at 24.

41 I.B. at 9-10.

Improvement Co. v. Continental Oil Co., 381 U.S. 392, 404:

> "Concepts of stare decisis in statutory interpretation apply to the *holdings* with which the case-by-case method of decision surrounds a statute. To recognize no differences between the Panhandle transfers and those in issue here, and in the name of stare decisis to hold that Commission jurisdiction depends on the form rather than the substance of the transaction, would turn the case-by-case process against itself." (Emphasis Original).

Panhandle did not involve any reallocation of gas, or any interruption of service, to either direct or resale customers, rather it presented for decision only the issue of whether a state commission had power to require an interstate pipeline to make direct sales, in competition with local gas distributors. This Court sustained such state power holding that Congress had not preempted the entire field of regulation of direct sales made in interstate commerce, had reserved to the states their preexisting powers to regulate both the *rate* and *service* aspects of such sales and that uniform national regulation was not required either by the Act or by the Constitution.

The dictum quoted by petitioners was a response to the contention of Panhandle, in its brief,[42] that since the Supreme Court of Indiana had held the pipeline obligated to serve all applicants, and other states would also impose such a public utility obligation, there would be conflicts between the several states and between the states and the FPC resulting from diverse administrative orders imposing service obligations beyond the physical capacity of the

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[42] Appellant's Brief at 49-50, Appendix O, 22a-23a.

pipeline to meet. Panhandle relied upon the provisions of the Act giving the FPC jurisdiction over the construction of new facilities for the interstate transportation of natural gas and its policy of refusing certification of sales to new customers without regard to any need for additional facilities when such authorization would impair the pipeline's ability to render satisfactory service to existing customers. It was in the context of this purely hypothetical situation, which had not then and still has not materialized, that this Court stated that: "... if such conflict should develop, the matter of interrupting service is one largely related, as appellees say, to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states." (Footnote Omitted).

II. THE FPC HAS NO STATUTORY POWER TO CHANGE THE IMPAIRMENT OF DELIVERY TERMS OF DIRECT SALE OR RESALE CONTRACTS BY TARIFF REVISION PROCEDURES

United filed with the FPC tariff provisions, applicable for the first time to its direct sale customers, and to its resale customers served by the separate intrastate pipeline systems in Southern Louisiana regulated by the LPSC and in derogation of their contract rights, which the agency made effective without any statutory findings that the existing contract terms were unduly preferential or discriminatory or that the revised terms were fair and lawful. The FPC urges that because there is an emergency caused by a gas supply shortage it is essential that it utilize the tariff revision procedures of Section 4(e) of the Act. As already established, the FPC has no special emergency authority to deal with such istuations; has not made any findings supported by evidence, substantial or otherwise, that there is an emergency and cannot order a pipeline to file tariffs applicable to direct sale contracts.

Furthermore, the FPC cannot utilize the tariff revision procedures of Section 4 to change either the rates or terms of service rendered to even interstate resale customers subject to its jurisdiction, unless they have consented to such unilateral changes by pipeline suppliers in their contract rights. The basic powers of the FPC over resale rates and service are defined by, and can only be exercised in accordance with, the specific procedures prescribed in Section 5(a) of the Act. That Section authorizes the agency to set aside and modify any new or existing resale rate, practice or contract which it finds to be "unjust, unreasonable, unduly discriminatory or preferential" on the basis of record evidence, after full hearings, and such powers may only be exercised prospectively (*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 333, 341-343; *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353). Section 4(e) adds to this basic power, in the case of a newly filed rate or a change in a previously filed rate proposed by a natural gas company, the further powers to preserve the status quo pending review of the new or changed rate by suspension for a limited period and, after final determination of its lawfulness, to make its order retroactive to the date when the suspended rate became effective by means of refunds (*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, cited *supra*, at 341-342; *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 113-114).

However, Section 4 does not supersede either the rates or any other terms of a contract between an interstate pipeline supplier and its distributor or pipeline resale customers. Unlike the Interstate Commerce Act which requires uniform rates and practices, the Natural Gas Act preserves and sanctions invididual private contracts. Natural gas companies retain the right "to establish ex parte, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the

rate agreed upon with a particular customer" (*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, cited *supra* at 343). Thus, the Act does not empower an interstate pipeline to unilaterally change its contracts and the tariff revision procedures of Sections 4(d) and 4(e) can be utilized only where the customers have consented to such changes (*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, cited *supra* at 342-344; *United Gas Pipeline Co. v. Memphis Light, Gas, and Water Division*, cited *supra* at 112-113).

United's Louisiana direct sale and resale customers have withheld such consent, except for a few who have recently signed so-called "tariff and service agreements" under duress. The FPC seeks to evade the rule of *Mobile* on the strained and tenuous theory that although a pipeline cannot unilaterally change the terms of its contracts governing service priorities in the event of a gas shortage, the agency may order such companies to formulate curtailment plans reallocating their gas supplies from direct sale to resale customers and to file such plans as tariffs.[43] This is a brazen and transparent attempt to circumvent the express requirement of Section 5(a)[44] that as a condition precedent to the exercise of its power to prescribe any rate, practice or contract the agency must find the existing tariff provision unlawful. The FPC has not found that the impairment of deliveries provisions in effect before United's tariff revisions discriminatory or preferential. Such a finding would appear to be precluded by the fact that United's direct sales contracts and Section 12.1 of its preexisting FPC

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[43] I.B. at 31-32.

[44] Applicable also to Section 4 proceedings under the Section 4(e) proviso that the FPC may make such orders in proceedings initiated by company tariff filings as would be proper in an investigation of an existing rate.

Gas Tariff are substantially identical.[45] Finally, the FPC does not have plenary or unlimited powers to substitute its judgment of what constitutes a lawful rate, practice or contract for that of the parties to such contracts. Thus, even when it is properly proceeding under Section 5(a) to modify an existing contract it cannot relieve a pipeline of an obligation to provide service at a rate which is less than the just and reasonable rate unless "the rate is so low as to adversely affect the public interest as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers as excessive burden, or be unduly discriminatory" (*FPC v. Sierra Pacific Power Co.*, cited *supra*, at 355).[46] This is because the powers of the agency to regulate rates are for the protection of the public interest, as opposed to the private interests of the utilities.

I. FPC JURISDICTION TO REALLOCATE DIRECT SALE GAS SUPPLIES TO RESALE CUSTOMERS IS NOT NECESSARY TO AVOID A REGULATORY GAP

Petitioners claim[47] that, unless the FPC has power to override the terms of direct sale contracts dealing with impairment of deliveries during periods of gas shortage, it will be impossible to establish a uniform and rational system of service priorities and that there will be an "attractive gap" in

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[45] See Appendix p. 24a-26a.

[46] *Sierra* held the rate and tariff provisions of the Natural Gas Act and of the Federal Power Act equivalent and identical.

[47] FPC, I.B. at 17-21, 24-26; United, I.B. 10-13.

the regulatory scheme. The FPC has adopted an individual pipeline company systemwide approach as the appropriate unit for gas reallocation purposes. United's direct sale contracts and resale tariffs have impairment of delivery terms which are substantially identical and uniform, and also wholly free of any undue or unlawful prejudice or preference between direct sale and resale customers. Even if this were not the case, the FPC has no statutory authority to equalize the terms of service rendered to direct and resale customers.

Congress committed to the exclusive regulatory control of the states the rate, licensing and service aspects of direct sales made by use of the interstate facilities of a jurisdictional pipeline (*Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 512, 513-514, 516-519; *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 333-337). The Act withheld from the FPC power to remedy undue discrimination or preference between such state regulated direct industrial consumers and federally regulated resale distributors and pipelines, and the industrial consumers they serve, because the granting of such power would have invaded the constitutional prerogatives of the states to regulate such commerce which have not been limited by the Act. Thus, the FPC's regulation of direct sales violates the Act and invades powers reserved to the States under the Tenth Amendment to the United States Constitution.

The Act does not occupy the entire field within the reach of federal constitutional power and limited federal regulation only to the "gap area" where the Supreme Court had held the states constitutionally unable to act by fixing the import prices of out-of-state gas sold for resale, in many cases, by an interstate pipeline to an affiliated distributor company (*Interstate United Gas Co. v. FPC*, 331 U.S. 681, 682, 689; *FPC v. Hope National Gas*, 320 U.S. 591, 609; *FPC v. East Ohio Gas*, 338 U.S. 464, 470, 472-473).

The Natural Gas Act is an "in interstate commerce" act, not one "affecting" interstate commerce. Congress was well aware of the difference and had used broader language in statutes passed before or contemporaneously with the Natural Gas Act such as the Fair Labor Standards Act of 1938, 52 Stat. 1060, the Bituminous Coal Act of 1937, 50 Stat. 72 and the National Labor Relations Act, 49 Stat. 449. This restriction on FPC jurisdiction was designed to avoid a repetition of the unanticipated and unintended invasion of state jurisdiction in the transportation field under the *Shreveport* doctrine (*Houston, E.&W.T.R.Co. v. United States*, 234 U.S. 342, 355-360). A statutory prohibition against discrimination in interstate transportation by railroad unaccompanied by any express limitation upon its scope was there properly interpreted as empowering the Interstate Commerce Commission to regulate intrastate rates which affected interstate traffic by virtue of discriminatory or preferential features. The states were determined to avoid any repetition of such federal invasion of their regulatory prerogatives and the plain language of the Act, enacted at the request of the states acting in concert through the National Association of Railroad and Utility Commissions, witnesses this compact between the states and the federal government.

The State submits that the explicit language of the Act, which leaves no latitude for inference concerning Congressional intent; its clear legislative history; the consistent administrative interpretation of the Act by the FPC that it lacks power to change the price or terms of direct sale contracts and that agency's repeated and unsuccessful attempts to have the Act amended to grant such authority compel the conclusion that uniform federal regulation is neither appropriate nor lawful insofar as direct sales are concerned. This Court, in a case presenting parallel elements construed identical statutory language to preclude an exercise of jurisdiction over the use of unfair methods of competition in intrastate sales despite the fact that the prohibition of such business

practices by persons engaged in interstate commerce handicapped such competitors (*Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U.S. 349, 350-355).[48]

Apart from these considerations, the FPC's individual pipeline company systemwide basis for rationing and reallocating gas deliveries creates, rather than corrects, undue and unlawful discrimination and preference between end-users of the same class in each state and in different states. It can insure, at most, only equal treatment to all customers of the same pipeline. It cannot afford equal treatment to end-users of the same class whether they are located in the same state or in different states. However, the State's suggested nationwide approach of allocating gas supplies to states, leaving to each state the responsibility for controlling the end-use of gas by its own citizens, would treat all states and localities fairly.

Many discriminatory and inequitable consequences flow from failure to allocate the total interstate supply of gas to the individual states of the federal union. A pipeline which has kept faith with its customers and not oversold its transmission capacity or gas reserves to maximize its profits will continue delivering full contract volumes, and on occasion increased volumes, to its direct industrial and power plant customers while other pipelines which have disregarded their contract and statutory obligations are substantially reducing deliveries to the same class of customers located in either the same state or in different states. The individual company approach has a disproportionate and oppressive adverse impact upon industrial and power plant consumers in the Gulf States where United has always been the dominant supplier of direct sales gas used for such purposes. United is

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[48] The decision took cognizance of the fact that the *Shreveport* doctrine was in effect during the life of the Federal Trade Commission but that it never asserted similar authority.

totally unlike other pipelines. It not only supplies gas for resale by distributors and industrial gas in several states but acts as a gigantic gas gatherer collecting gas from the producing areas of the Southwest which it sells to, and transports for, five major interstate pipelines. This is its principal role. It is, in terms of volume, the world's largest transporter of natural gas and its system purchased, collected, and transported more than 1.8 trillion cubic feet in 1970. (Tr. 71-79, 120). Thus, consumers in producing states unfairly bear the brunt of a gas shortage reflecting increased demand in other states.

Moreover, the FPC is exceeding its statutory powers and invading prerogatives Congress deliberately left to the states when it seeks to control the end-use of gas by ultimate consumers. Each state is entitled to its own choice of service priorities and is not obliged to make them identical with those of other states. For, as the FPC itself recognized in Opinion No. 606: "Our jurisdiction over the disposition of natural gas ends when it reaches the hands of a nonjurisdictional person such as a distributor purchasing for resale. This language would in effect attempt to extend our jurisdiction over the disposition of gas by a local distributor, a matter within the province of the local regulatory body. *We will of course consider the past and planned disposition of volumes by the customers when ruling upon allocations for the various customers, but after allocating among United's customers, we leave for the states or other local bodies the job to oversee the distribution of that gas by the customers at the local level."*[49] *Thus, while admitting that it lacks jurisdiction to control end-use of natural gas by ultimate consumers, the FPC is unlawfully exercising such jurisdiction.* It is self-evident that the use made of gas by a direct industrial consumer is at least as much a matter of purely local concern as the disposition of resale gas by a distributor.

[49] Sol. Gen. Pet. at 71-a-72a. Emphasis added.

Contrary to the claims of United[50] and Brooklyn Union Gas Company,[51] Louisiana is not asserting that the citizens of a producing state are entitled to a priority in the use of their natural gas reserves during a period of shortage and taking action which prohibits exports of gas to other states of the type deemed to constitute a direct burden on interstate commerce in *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 584, 598. Rather, the State asserts only a right to a fair share of its natural gas reserves. Furthermore, the investigation instituted by the LPSC does not have as its purpose, as United suggests,[52] any attempt to rechannel interstate gas to industrial consumption within its borders. Rather, that investigation concerns only United's deliberate and persistent refusal to meet its obligations as an intrastate pipeline (Appendices R, S and T, at 40a, 44a, 47a). Nor is there any merit to United's contention[53] that the LPSC is constitutionally prohibited from regulating curtailment practices of intrastate gas pipelines. Article VI, Section 4, of the Louisiana Constitution provides that the ". . . power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered . . ." by such companies. This is an unusually broad delegation of power not found in the conventional state or federal public utility statute. Further, in a Special Order issued September 28, 1971 and in a General Order issued September 30, 1971, the Commission declared that it "has been vested with the authority and responsibility to regulate and

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[50] I.B. at 11.

[51] Brief, *Amicus Curiae* at 11.

[52] I.B. at 11.

[53] I.B. at 11-12.

control utilities with respect . . . to the *services* rendered by public utilities" and exercised such powers with respect to both United and other intrastate pipelines by instituting a comprehensive investigation. In any event, FPC "jurisdiction was not intended to vary from state to state depending upon the degree of state regulation." (*The Secretary of the Army, Atlantic Seaboard Corporation*, Order Denying Rehearing, Dkt. No. CP66-179, issued October 22, 1971).

Petitioners' suggestion that courts are not competent to deal with any disputes which may arise from the failure to an interstate pipeline to honor its clearly defined delivery obligations to direct sale customers is clearly without merit. This is an area in which the judiciary branch, not the FPC, has specialized expertise. Furthermore, the judicial process is subject to supervision by this Court and it has expressly rejected the argument that uniformity of regulation under the Act will be destroyed or impaired by permitting courts to enforce traditional common law contract rights (*Pan American Petroleum Corp. v. Superior Court of Delaware for New Castle County*, 366 U.S. 656, 665-666).

Finally, the concept of an "attractive gap" applies only in the absence of an express statutory prohibition against regulation of a specific subject as this Court held in rejecting the FPC's claim of implied authority in *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 499, discussed *infra* at 38.

II

THE COURT OF APPEALS JUDGEMENT THAT UNITED'S GREEN SYSTEM IS AN INTRASTATE PIPELINE WAS NOT AN ABUSE OF ITS JUDICIAL DISCRETION

The LPSC has always exercised exclusive and sole jurisdiction over the separate intrastate pipeline systems of

United in Southern Louisiana. Thus, the issue decided on the merits by the Court of Appeals was whether, by the self-serving and unlawful acts of United, this intrastate system has been converted to an interstate system to oust the LPSC of its lawful jurisdiction. This is not the normal situation of a dispute between a private party and a federal administrative agency concerning a matter within its established statutory powers to which the doctrine of exhaustion of administrative remedies applies. Rather, although arising in the context of a private lawsuit, this is a controversy concerning conflicting and mutually exclusive claims of jurisdiction between Louisiana and the Federal Power Commission.

On September 28, 1971, the LPSC instituted a comprehensive investigation of United's separate Southern Louisiana intrastate systems (the Green and Purple Systems).[54] United denied the jurisdiction of the state agency claiming that its unilateral action in applying to the FPC for certification of such systems invoked the supremacy clause of the United States Constitution to terminate the sole and exclusive jurisdiction the LPSC has continuously and lawfully exercised. It was, and still is, unable to cite any authority supporting this view. In Special Order No. 17-71, *Order Affirming Jurisdiction and to Show Cause*, (Appendix S, 44a-46a), the LPSC rejected this contention on the following grounds which United has never answered or appealed:

> "The doctrine of pre-emption is applicable only where Congress has enacted legislation designed to encompass all aspects of a particular field of regulation. But, Congress has not delegated to the FPC the full reach of its constitutional powers over interstate commerce. On the contrary, it authorized that agency to regulate only certain limited aspects of the transportation and sale for

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[54] Appendix R, 40a-43a.

resale in interstate commerce of natural gas. Congress gave the FPC no authority at all over intrastate commerce (*FPC v. Transcontinental Gas Corporation*, 365 U.S. 1, 17). Furthermore, Congress enacted Section 1 (c) of the Natural Gas Act in order to reserve regulation of intrastate pipelines and of local distribution systems entirely to state regulation. Plainly then, the FPC must defer to the states on matters which are primarily of local concern.

The supremacy clause is inapplicable unless and until a binding and final determination has been made that United's separate pipeline system in southern Louisiana is both in interstate commerce and outside the scope of the Hinshaw Amendment.

Such a determination cannot be made by the FPC. Only the courts can exercise the judicial function of determining the lawfulness of an assertion of jurisdiction by that agency in a particular proceeding. State regulation by this Commission will end therefor, if at all, only after the Federal Courts have made an adverse decision which is no longer subject to judicial review.

This Commission believes that during the pendency of such litigation it has both the authority and the duty to continue its regulation of United's rates and services. . . ."

Aside from these unique aspects involving a conflict of jurisdiction, the Court of Appeals did not abuse its judicial discretion even if the case is regarded as a conventional injunction proceeding. The FPC and United maintain that the Court of Appeals committed reversible error in rendering judgment on an issue admittedly within its jurisdiction

because of the mere pendency before the FPC of an administrative proceeding presenting the same legal question. Petitioners mistake the nature of the doctrine of exhaustion of administrative remedies. It is a guide to the exercise of discretionary judicial power to hear and determine controversies, not an absolute and inflexible barrier to court review. The cases cited by petitioners involve attempts by a private party challenging the jurisdiction of a federal administrative agency to enjoin or to otherwise terminate, by declaratory judgments, administrative proceedings concerned with the determination of so-called "jurisdictional facts" which will determine whether that party is subject to regulation. Here, neither LPL nor LPSC has sought to invoke the authority of the courts to stay or end the FPC's pending certificate proceedings. The judgment of the court below has not precluded the later issuance of FPC Opinion No. 610 which reached a contrary conclusion concerning the jurisdictional status of United's Green System. In fact, the FPC has remanded the case to an examiner for further hearings and the administrative process continues completely unimpeded and uninterrupted. Opinion No. 610-A issued on April 7, 1972 denied all petitions for rehearing and is now final. A timely petition for review has been filed by LPL in the Fifth Circuit. Court review of these jurisdictional issues will also proceed under the provisions of Section 19(b) of the Act aand, contrary to United's claim,[55] Congress has not prohibited resort by a private party to the general equity powers of the federal courts for *interim relief* pending a final resolution of issues of jurisdiction.

The vital distinction between cases where courts intervene in a controversy between a private litigant and the agency, by blocking or refusing to assist the administrative body in its task of investigating jurisdictional facts, and cases

[55] I.B. 22-23.

where the agency's investigatory powers are unopposed was recognized and relied upon in *FPC v. Panhandle Eastern Pipe Line Co.*, 172 F.2d 57, 59-60, aff'd. 337 U.S. 499, 514-515. That case also rejected the primary argument made here that *the FPC is the sole competent judge of the scope of its own jurisdiction and that courts must defer to the pendency of its administrative proceedings until it can determine its own power and the necessity of its exercise.* While this ruling was made in the context of an FPC effort to obtain a court injunction during the pendency of its administrative proceeding, and this case presents the same issue in the context of the FPC's effort to prevent such an injunction, the rationale of the decision is equally applicable to both situations. *Panhandle* applied the long standing rule that where an agency is clearly acting in excess of its statutory authority, exhaustion of administrative remedies is unnecessary (*Leedom v. Kyne*, 358 U.S. 184; *City of Chicago v. Atchison, T & S.F. Railway Co.*, 357 U.S. 77; *Skinner & Eddy Corp. v. U. S., 249 U.S. 557, 562;* Deering Milliken, Inc. v. Johnson, 295 F.2d 856 (C.A. 4)).

The FPC, which was neither a defendant nor obliged to intervene in this private litigation between United and LPL, having participated as a party cannot complain that it was obliged to defend its jurisdiction and that the Court rendered a judgment on the merits adverse to its position. Petitioners' real complaint is not the *judgment* of the Court, which is not yet final, but rather its *opinion* which impedes their efforts to unlawfully oust the LPSC of its jurisdiction, convert an intrastate pipeline to an interstate pipeline and reallocate direct sale gas volumes from Louisiana customers to industrial consumers in other states served by this pipeline's resale customers who will be compelled to pay higher rates. Yet, the FPC and United have neither petitioned the Court of Appeals for rehearing *en banc* nor sought review on the merits by this Court.

A reading of Opinion No. 610 discloses the reason for this reluctance. The evidentiary records before the FPC and before the District Court both related to the same facts and year of actual gas flows and operations. In the light of the Fifth Circuit opinion, petitioners doubt their ability to prevail on the merits and wish to improve their prospects by resorting to facts not of record which result from United's deliberate rearrangement of its gas flows and operations, admittedly in violation of Section 7 of the Act, after it filed its October 1, 1970 application for a certificate. Opinion No. 610 unlawfully finds that United's motives in seeking to serve its own interests and evade state jurisdiction are immaterial and irrelevant. The FPC has officially noticed extra-record facts and unlawfully denied any opportunity to the parties to the proceeding[56] to controvert such facts by rebuttal evidence and cross-examination under Section 7(c) of the Administrative Procedure Act.

Petitioners seek to invoke the aid of this Court in their unlawful effort, unsupported by any precedent, to exercise certificate, curtailment and rate jurisdiction over United's intrastate Green System during the prolonged period rerequired to obtain a final resolution of this conflict of jurisdiction issue. If this Court does not vacate the judgment of the Fifth Circuit as to the Green System, the issue of whether the FPC is bound by that judgment will be litigated. If the LPSC prevails on this and related issues, the FPC will be unable to enforce the conditions of Opinion No. 610 that service to all of United's intrastate customers shall be continued only on an emergency basis and that they shall be subject to interim curtailment and rate increases and compelled to execute service agreements waiving their contract rights against unilateral changes by United. The State submits that these conditions are arbitrary, capricious, contrary to

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[56] The State and LPSC requested this opportunity in their Petition for Rehearing of Opinion No. 610.

law, beyond the statutory authority of the FPC and a deprivation of due process of law in violation of the Fifth Amendment to the United States Constitution. The FPC will also then be unable to enforce its direction that all of United's intrastate pipeline facilities and systems be operated as part of its integrated interstate pipeline system which is equally unlawful and unconstitutional and designed to aid United's efforts to evade state regulation. This is the relief sought in the LPSC injunction suit[57] which United characterizes as "an injunction against exercise of FPC regulatory jurisdiction."[58]

Unlike the cases cited by petitioners, where the only injury incurred by the parties seeking court relief was the burden and expense of participating in an agency hearing which this Court does not view as irreparable injury[59] LPL alleged in its sworn complaint in the District Court a material danger of a blackout or brownout of electrical service in a wide geographical area resulting in incalculable damages; that it has no adequate alternate means of generating electricity and would permanently lose sales. Thus, the test of the extent of the injury which will be caused by exhaustion of administrative remedies is clearly satisfied here. The question of certificate jurisdiction was decided by the Fifth Circuit upon the basis of undisputed facts and purely as a matter of statutory interpretation and the applicability of its own *Florida Parishes* decision.[60] Issues of this nature are within

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[57] Appendix Q, 27a.

[58] I.B. at 21.

[59] *Petroleum Exploration, Inc. v. Public Service Commission*, 304 U.S. 209, 220-221.

[60] *United Gas Pipeline Co.*, Docket No. CP 62-161, 30 F.P.C. 560 (1963), *aff'd. Louisiana Public Service Commission v. FPC*, 359 F.2d 525 (C.A. 5).

the specialized competence of the courts, not that of the FPC.

The petitioners have exposed the completely untenable nature of their views concerning the procedural issue of exhaustion of remedies by the inconsistency of the position they maintained before the two lower courts and the position they urge upon this Court. Below, they denied the jurisdiction of the District Court to hear and decide, on the merits, either the direct sale issue or the certificate issue in this case. Here, they seek review of the merits of the Court of Appeals decision on the former issue but have avoided such review on the latter issue. They seek to differentiate these two substantive issues[61] on the ground that the exhaustion of remedies problem has been mooted by the FPC's issuance of Opinion Nos. 606 and 606-A prior to the Court of Appeals decision. But, the FPC has now issued both its Opinion Nos. 610 and 610-A in the certificate case thereby, under their view, also mooting the very procedural issue they seek to have reviewed by this Court. Petitioners' effort to differentiate between the direct sale issue and the certificate issue on the ground that the Fifth Circuit squarely rejected the legal rationale of Opinion No. 606 is equally futile and unsound because that court's opinion also squarely rejected the legal rationale of Opinion No. 610.

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[61] Sol. Gen. Pet. 20; United Pet. 14, ftn. 26.

CONCLUSION

The State maintains that certiorari was improvidently granted in this case because there is no support, either in agency findings of fact or in the pleadings of petitioners, for the challenged claim that unless the FPC has power to reallocate United's direct sale gas volumes essential deliveries for domestic use will be jeopardized. In any event, the judgment of the Court of Appeals should be affirmed in its entirety.

Respectfully submitted

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APPENDIX A

GAS EXPORTING STATES RANKED IN ORDER OF PRODUCTION */

(Millions cubic feet)

States	Deliveries	Receipts	Exports**/
Louisiana	6,522,705	1,278,995	5,243,710
Mississippi	5,850,437	6,062,845	--
Texas	3,993,263	483,293	3,509,570
Tennessee	3,657,812	3,921,292	--
Kentucky	3,489,571	3,658,171	--
Alabama	2,863,621	3,162,432	--
Arkansas	2,519,758	2,711,753	--
Oklahoma	2,263,047	1,378,159	85[illegible]
Kansas	2,251,621	1,9[illegible]	2[illegible],203
Ohio	1,846,031	2,8[illegible]	--
New Mexico	1,564,480	745,257	815,223
West Virginia	1,404,566	1,356,860	51,706
Missouri	1,308,335	1,766,524	--
Pennsylvania	1,291,854	2,022,425	--
Indiana	1,254,114	1,802,014	--
Arizona	1,226,680	1,421,255	--
Nebraska	1,073,502	1,276,838	--
Illinois	1,071,450	2,230,920	--
Georgia	1,016,515	1,333,701	--
Iowa	973,565	1,296,621	--
South Carolina	848,423	994,488	--
Virginia	823,196	957,370	--
North Carolina	710,066	848,423	--
Maryland	661,936	830,054	--
New Jersey	484,644	801,428	--
Idaho	360,616	402,737	--
Washington	341,612	487,610	--
Oregon	260,306	350,678	--
Wyoming	258,667	74,071	184,596
New York	234,203	937,040	--
Minnesota	156,936	482,966	--
Utah	141,310	220,174	--
Colorado	89,723	253,398	--
Connecticut	89,137	148,575	--
Rhode Island	71,216	94,348	--
Michigan	29,770	776,101	--
Massachusetts	21,537	159,909	--
Montana	20,789	71,177	--
Wisconsin	17,888	336,019	--
North Dakota	8,383	12,823	--
Alaska	2,962	0	2,983
Delaware	1,922	27,559	--
New Hampshire	1,887	11,577	--
South Dakota	1,286	36,2[illegible]	--
National Total	49,073,658	59,948,658	10,993,418

Louisiana exports as a percentage of Total National Deliveries - 47.69[illegible]

*/ Source: Table 57, Gas Facts, A Statistical Record of the Gas Utility Industry in 1969.

**/ Excess deliveries over receipts.

APPENDIX B

FIVE LARGEST GAS PRODUCING STATES RANKED IN ORDER OF 1969 GROSS PRODUCTION

(Millions cubic feet)

States	Volume	Percentage of National Production
United States	22,679,105	100%
Texas	8,914,794	39.3%
Louisiana	7,561,027	33.3%
Oklahoma	1,741,677	7.67%
New Mexico	1,142,594	5%
Kansas	885,603	3.9%

*Source: Table 26, Gas Facts, A Statistical Record of the Gas Utility Industry in 1969.

APPENDIX C

FIVE LARGEST GAS PRODUCING STATES RANKED IN ORDER OF 1969 NET PRODUCTION*

(Millions cubic feet)

States	Volume	Percentage of National Production
United States	21,223,990	100%
Texas	7,964,698	37.5%
Louisiana	7,386,678	34.8%
Oklahoma	1,654,481	7.7%
New Mexico	1,132,191	5.3%
Kansas	885,822	4.17%

*Source: Table 77, Gas Facts, A Statistical Record of the Gas Utility Industry in 1969.

APPENDIX D

FIVE LARGEST GAS PRODUCTION STATES RANKED
IN ORDER OF 1969 MARKETED PRODUCTION*

(Millions cubic feet)

States	Volume	Percentage of National Production
United States	20,698,240	100%
Texas	7,853,199	37.9%
Louisiana	7,227,826	34.9%
Oklahoma	1,523,715	7.36%
New Mexico	1,138,133	5.04%
Kansas	883,156	4.26%

*Source: Table 28, Gas Facts, A Statistical Record of the Gas Utility Industry in 1969.

STATE OF LOUISIANA - DEPARTMENT OF CONSERVATION

ANALYSIS OF INTERSTATE GAS
IN MCF - 15.025 pounds Abs. 60 Degrees

	Deliveries To Other States	Less - Receipts From Other States	Net Interstate Deliveries	Total Louisiana Production (Net Mcf)	Percentage Interstate Deliveries
TOTAL - ALL TRANSPORTERS:					
Year 1952	1,319,064,548	712,728,169	606,336,379	1,284,339,790	47.21 %
1953	1,510,395,368	842,651,342	667,744,026	1,399,740,719	47.70 %
1954	1,714,902,151	978,759,074	736,143,077	1,464,953,448	50.25 %
1955	1,961,456,609	1,013,196,165	948,260,444	1,722,901,435	55.04 %
1956	2,279,511,313	1,160,187,721	1,119,723,592	1,937,565,711	57.79 %
1957	2,518,570,014	1,166,918,806	1,351,651,208	2,151,233,222	62.83 %
1958	2,725,379,461	1,226,329,657	1,499,049,804	2,353,883,089	63.68 %
1959	3,039,269,485	1,290,898,582	1,748,370,903	2,732,469,684	64.22 %
1960	3,366,493,305	1,317,987,805	2,048,505,500	2,994,361,745	68.40 %
1961	3,467,045,796	1,278,825,709	2,188,220,087	3,130,616,114	69.90 %
1962	3,672,600,177	1,163,229,049	2,509,371,128	3,513,123,651	71.43 %
1963	3,953,398,984	1,161,981,239	2,791,617,745	3,882,446,999	71.90 %
1964	4,149,540,354	1,156,908,774	2,992,631,580	4,181,052,266	71.58 %
1965	4,437,292,742	1,168,079,132	3,269,213,610	4,491,752,580	72.78 %
1966	4,850,988,525	1,109,229,151	3,741,739,374	5,148,167,184	72.68 %
1967	5,289,218,940	1,082,934,507	4,206,284,433	5,793,015,416	72.61 %
1968	5,765,336,709	1,033,758,149	4,731,628,560	6,492,728,904	72.88 %
1969	6,294,299,512	996,818,433	5,297,481,079	7,267,900,195	72.89 %
1970	6,748,070,324	1,029,836,978	5,718,233,346	7,796,747,096	73.34 %

NOTE: Gas production is net production after deducting gas returned to earth

SOURCE OF INFORMATION: Form R-5-T Gas Transporter's Report - using reports of only those transporters exporting or importing gas into Louisiana.

APPENDIX E

STATE OF LOUISIANA - DEPARTMENT OF CONSERVATION

ANALYSIS OF NATURAL GAS SUPPLY
IN MCF - 15.025 pounds Abs. 60 Degrees

	ALL GAS COMPANIES			UNITED GAS PIPE LINE CO.		
	1960	1965	1970	1960	1965	1970
1. Produced in State	2,994,861,745	4,491,782,580	7,796,747,096	657,494,824	885,983,413	1,330,269,599
2. Imports into State	1,317,987,805	1,168,079,132	1,029,836,978	224,089,529	150,418,303	144,792,981
3. Total Gas Available(1+2)	4,312,849,550	5,659,831,712	8,826,584,074	881,584,353	1,036,401,716	1,475,062,580
4. Exports from State	3,366,493,305	4,437,292,742	6,748,070,324	299,637,510	319,821,477	485,701,523
5. Used in State (3-4)	946,356,245	1,222,538,970	2,078,513,750	581,946,843	716,580,239	989,361,057
6. Percentage of Gas Produced in State Used in State (5÷1)	31.5	27.2	20.6	88.5	80.8	74.4
7. Percentage of Gas Used in State Supplied by United Gas Pipeline Company				61.4	58.6	47.5
8. Increase in Exports* Related to 1960 Base	-	31.8	100.4	-	6.7	62.1

*Example (Col. 4)

$$\frac{1970 - 1960}{1960} = 100.4\%$$

*Source of Information: Form R-5-T Gas Transporter's Report - using reports of only those transporters exporting or importing gas into Louisiana.

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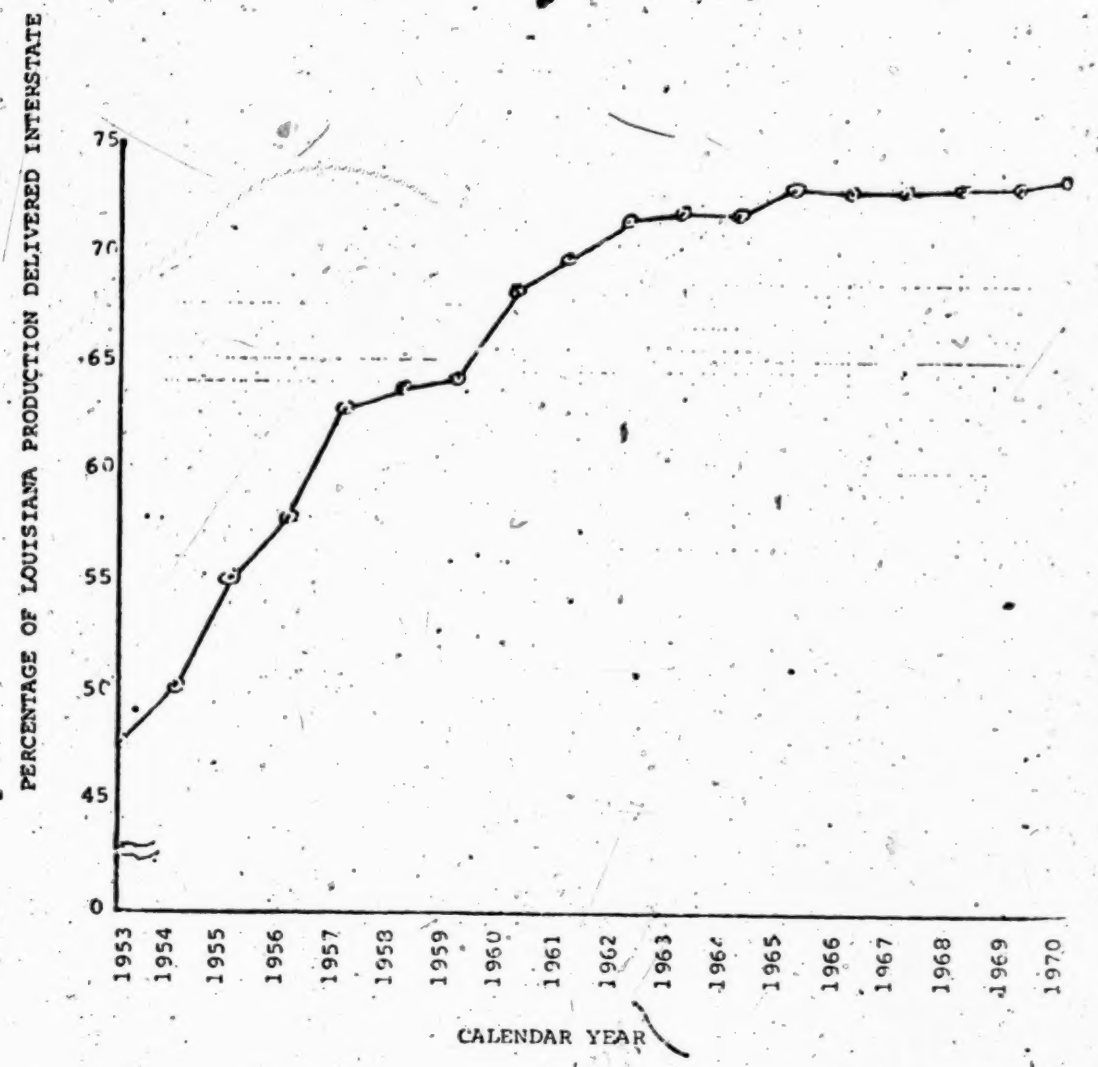
APPENDIX F

APPENDIX G

STATE OF LOUISIANA - DEPARTMENT OF CONSERVATION

TREND OF EXPORTS OF NATURAL
GAS PRODUCED IN LOUISIANA



APPENDIX H

LOUISIANA RECOVERABLE RESERVES, NEW FIELD,
AND RESERVOIR DISCOVERIES AS A PERCENTAGE OF THE NATION*

(Million cubic feet)

Recoverable Reserves of Natural Gas

Year	United States	Louisiana	Louisiana Percentage of U.S.
1968	287, 349, 852	88, 015, 624	30.6[illegible]
1967	292, 907, 76[illegible]	86, 290, 009	29.46
1966	289, 332, 605	83, 684, 092	28.92[illegible]
1965	286, 466, 923	82, 811, 157	28.9[illegible]
1964	281, 251, 454	79, 076, 309	28.12
1963	276, 151, 233	75, 364, 992	27.29

New Field Discoveries

1969	1, 769, 557	262, 140	14.81
1968	1, 376, 429	376, 919	27.38
1967	3, 170, 520	750, 544	23.68
1966	2, 947, 329	433, 345	14.70

New Reservoir Discoveries

1969	2, 043, 219	1, 002, 308	49.06
1966	1, 545, 612	687, 902	44.51
1967	2, 524, 651	1, 026, 915	40.68
1966	3, 110, 396	1, 284, 014	41.28

*Source: Table 2, Gas Facts; A Statistical Record of the Gas Utility Industry for 1963-1969.

STATE OF LOUISIANA - DEPARTMENT OF CONSERVATION

ANALYSIS OF NATURAL GAS SUPPLY FOR
UNITED GAS PIPE LINE COMPANY
IN MCF - 15.025 pounds Abs. 60 Degrees

Year	Total Available in State	Exports	Imports
1970	1,475,062,580	485,701,523	144,792,981
1969	1,442,660,890	476,552,185	141,408,910
1968	1,256,852,564	423,359,903	125,145,762
1967	1,122,302,791	379,492,001	111,487,781
1966	1,057,033,316	353,995,578	114,125,884
1965	1,036,401,716	319,821,477	150,418,303
1964	1,029,034,128	323,067,954	124,390,436
1963	(no records)	293,386,955	134,626,268
1962	860,752,608	264,444,967	152,373,933
1961	871,779,864	301,316,763	223,866,184
1960	881,584,353	299,637,510	224,089,529
1959	839,182,532	276,013,704	206,142,854
1958	806,976,272	264,351,336	198,226,154
1957	796,702,907	264,580,704	210,846,432
1956	803,881,299	259,042,333	220,963,719
1955	758,973,817	254,816,631	205,306,598
1954	764,600,945	244,535,502	197,895,391
1953	700,753,308	225,835,779	185,387,221
1952	514,698,650	121,540,119	

Source: Table 2, Gas Facts, A Statistical Record of the Gas Utility Industry.

APPENDIX [illegible]

COMPARISON OF PERCENTAGE OF ESTIMATES PROVED RECOVERABLE RESERVES OF NATURAL GAS IN 1969 FOR LOUISIANA AND THE NATION

(Millions cubic feet)

	United States	Louisiana	Percentage Utilization [illegible]
Production*	22,679,195	7,561,027	
Total Proved Recoverable Reserves**	275,108,835	85,056,6[illegible]	[illegible]
		N. 4,287,202	1.5[illegible]
		S.80,769,437	29.3%
Non-Associated Proved Recoverable Reserves**	211,873,282	69,429,161	32.7%
		N. 2,826,606	1.33%
		S.66,602,555	31.4%
Associated Dissolved**	59,633,644	15,514,268	26.0%
		N. 1,347,386	2.25%
		S.14,166,882	23.7%

* Source: Table 26, Gas Facts, A Statistical Record of the Gas Utility Industry in 1969.

** Source: Table 2, Gas Facts, A Statistical Record of the Gas Utility Industry in 1969.

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APPENDIX X

GAS REQUIREMENTS

FIRM INDUSTRIAL AND FIRM GENERATION

PERCENT FIRM OF TOTAL,
(MILLION CUBIC FEET)

	FIRM		TOTAL FIRM INDUSTRIAL AND GENERATION	TOTAL ALL USES	PERCENT FIRM INDUSTRIAL AND GENERATION OF TOTAL
	INDUSTRIAL	GENERATION			
LOUISIANA	1,181,538	315,274	1,496,812	1,790,250	84
TEXAS	1,933,846	835,163	2,769,009	4,008,246	69
ARKANSAS	189,877	94,333	284,210	418,346	68
NEVADA	12,656	21,287	33,943	54,399	62
MISSISSIPPI	129,647	83,595	213,242	374,361	57
FLORIDA	55,681	143,847	199,528	362,028	55
OKLAHOMA	56,703	224,331	281,034	540,566	52
W. VIRGINIA	80,750	45	80,795	215,504	37
INDIANA	191,067	3,299	194,366	546,422	36
OHIO	371,781	12,960	384,741	1,112,768	35
PENNSYLVANIA	292,585	683	293,268	841,296	35
ALABAMA	108,861	133	108,994	317,765	34
DELAWARE	8,162	88	8,250	27,320	30
ILLINOIS	283,860	72,341	356,201	1,216,941	29
IDAHO	11,683	-	11,683	45,320	26
TENNESSEE	72,972	-	72,972	300,787	24
MICHIGAN	170,611	27,854	198,465	877,807	23
MARYLAND	23,362	11,513	34,875	165,111	21
MAINE	394	-	394	1,906	21
VIRGINIA	28,346	-	28,346	144,013	20
CONNECTICUT	12,682	-	12,682	64,020	20
IOWA	62,359	424	62,783	378,610	17
N. CAROLINA	26,970	3	26,973	157,610	17
WYOMING	13,077	-	13,077	75,417	17
KENTUCKY	39,854	335	40,189	254,315	16
RHODE ISLAND	3,286	-	3,286	24,109	14
WASHINGTON	22,141	-	22,141	159,100	14
OREGON	13,296	-	13,296	93,715	14
WISCONSIN	38,970	3,049	42,019	328,652	13
ARIZONA	23,654	4,876	28,530	215,375	13
MINNESOTA	38,748	3,601	42,349	332,197	13
NEBRASKA	28,429	-	28,429	215,369	13
GEORGIA	44,568	-	44,568	368,446	12
NEW YORK	87,639	335	87,974	762,010	12
S. CAROLINA	18,916	-	18,916	161,523	12
KANSAS	56,934	7,319	64,253	602,834	11
NEW JERSEY	39,669	178	39,847	357,652	11
MISSOURI	37,729	5,043	42,772	439,698	10
COLORADO	17,186	5,180	22,366	254,814	9
MASSACHUSETTS	13,413	486	13,899	151,907	9
NEW MEXICO	4,717	8,322	13,039	167,263	8
MONTANA	2,590	1,234	3,824	82,168	5
CALIFORNIA	86,922	32,014	118,936	2,177,896	5
UTAH	3,618	-	3,618	122,358	3
NEW HAMPSHIRE	185	-	185	5,430	3
VERMONT	29	-	29	2,819	1
S. DAKOTA	160	-	160	31,435	1
N. DAKOTA	30	-	30	19,463	0
DIST. OF COL.	-	-	-	24,852	-
UNITED STATES*	5,942,153	1,919,145	7,861,298	21,392,314	37

FUTURE GAS REQUIREMENTS OF THE UNITED STATES" VOLUME NO. 4 - OCTOBER 1971, APPENDIX C - CALENDAR YEAR 1970.
DENVER RESEARCH INSTITUTE, UNIVERSITY OF DENVER, DENVER, COLORADO

* ALASKA AND HAWAII OMITTED

GAS REQUIREMENTS

ELECTRIC GENERATION

PERCENT FIRM OF TOTAL ELECTRIC GENERATION
(MILLION CUBIC FEET)

	FIRM	INTERRUPTIBLE	TOTAL GENERATION	PERCENT FIRM OF TOTAL GAS
W. VIRGINIA	45	-	45	100
MARYLAND	11,513	130	11,643	99
ARKANSAS	94,333	7,127	101,460	93
OKLAHOMA	224,331	18,354	242,685	92
LOUISIANA	315,274	40,054	355,328	89
MISSISSIPPI	83,595	13,674	97,269	86
TEXAS	835,163	161,723	996,886	84
NEVADA	21,287	5,335	26,622	80
OHIO	12,960	3,401	16,361	79
FLORIDA	143,847	41,324	185,171	78
ILLINOIS	72,341	60,454	132,795	54
MICHIGAN	27,854	34,882	62,736	44
MONTANA	1,234	2,166	3,400	36
NEW MEXICO	8,322	41,468	49,790	17
DELAWARE	88	598	686	13
COLORADO	5,180	40,560	45,740	11
INDIANA	3,299	26,061	29,360	11
WISCONSIN	3,049	27,671	30,720	10
MISSOURI	5,043	59,911	64,954	8
MASSACHUSETTS	486	5,772	6,258	8
ARIZONA	4,876	56,648	61,524	8
PENNSYLVANIA	683	8,785	9,468	7
MINNESOTA	3,601	61,365	64,966	6
CALIFORNIA	32,014	639,049	671,063	5
KENTUCKY	335	8,446	8,781	4
KANSAS	7,319	161,528	168,847	4
IOWA	424	78,585	79,009	1
ALABAMA	133	16,088	16,221	1
NEW YORK	335	113,956	114,291	0
GEORGIA	-	60,688	60,688	-
NEW JERSEY	178	48,607	48,785	-
NEBRASKA	-	46,668	46,668	-
S. CAROLINA	-	43,114	43,114	-
TENNESSEE	-	18,562	18,562	-
N. CAROLINA	3	18,299	18,302	-
UTAH	-	13,921	13,921	-
S. DAKOTA	-	4,212	4,212	-
VIRGINIA	-	3,980	3,980	-
RHODE ISLAND	-	2,394	2,394	-
N. DAKOTA	-	352	352	-
CONNECTICUT	-	150	150	-
WYOMING	-	-	-	-
WASHINGTON	-	-	-	-
VERMONT	-	-	-	-
OREGON	-	-	-	-
NEW HAMPSHIRE	-	-	-	-
MAINE	-	-	-	-
IDAHO	-	-	-	-
DIST. OF COL.	-	-	-	-
UNITED STATES*	1,919,145	1,996,062	3,915,207	49

FUTURE GAS REQUIREMENTS OF THE UNITED STATES - VOLUME NO. 4 - OCTOBER 1971
APPENDIX C - CALENDAR YEAR 1970
DENVER RESEARCH INSTITUTE, UNIVERSITY OF DENVER, DENVER, COLORADO

*ALASKA AND HAWAII OMITTED.

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APPENDIX H

GAS REQUIREMENTS

PERCENT FIRM OF TOTAL
(MILLION CUBIC FEET)

	FIRM						PERCENT FIRM OF TOTAL
	RESIDENTIAL	COMMERCIAL	INDUSTRIAL	GENERATION	TOTAL FIRM	TOTAL ALL USES	
OHIO	471,663	184,921	371,781	12,960	1,041,225	1,112,769	94
DIST. OF COL.	14,743	11,133	-	-	25,876	27,852	93
LOUISIANA	83,556	27,241	1,181,538	315,274	1,607,609	1,790,250	90
NEW HAMPSHIRE	3,198	1,365	185	-	4,748	5,430	87
ARKANSAS	48,055	27,743	189,877	94,333	360,008	418,346	86
NEVADA	6,721	5,849	12,656	21,287	46,513	54,399	86
CONNECTICUT	31,927	10,537	12,682	-	55,146	64,020	86
PENNSYLVANIA	375,802	102,859	292,585	683	771,929	841,296	85
MAINE	782	439	394	-	1,615	1,906	85
MASSACHUSETTS	84,055	28,459	13,413	486	126,413	151,907	83
N. DAKOTA	8,316	7,551	30	-	15,897	19,463	82
ILLINOIS	443,082	180,470	283,860	72,341	979,753	1,216,941	81
MICHIGAN	350,044	138,041	170,611	27,854	686,550	877,807	78
MARYLAND	73,248	21,417	23,362	11,513	129,537	165,111	78
TEXAS	269,055	97,003	1,933,846	835,163	3,135,067	4,008,246	78
RHODE ISLAND	11,606	3,614	3,286	-	18,506	24,109	77
INDIANA	155,323	67,333	191,067	3,299	417,022	546,422	76
NEW YORK	358,049	127,099	87,639	335	573,122	762,010	75
W. VIRGINIA	56,585	22,922	80,750	45	160,302	215,504	74
DELAWARE	8,700	3,735	8,162	88	20,191	27,330	74
MISSISSIPPI	37,999	19,652	129,647	83,595	270,893	371,361	73
OKLAHOMA	76,471	37,501	56,703	224,331	395,006	540,566	73
VIRGINIA	49,968	24,511	28,346	-	102,825	144,013	71
NEW JERSEY	147,279	54,877	39,669	178	242,003	357,652	68
FLORIDA	76,827	15,088	55,681	143,847	231,443	362,084	64
KENTUCKY	83,766	33,948	39,854	335	157,903	254,315	62
ALABAMA	63,039	25,021	108,861	133	197,054	317,765	62
COLORADO	79,402	51,393	17,186	5,180	153,161	254,614	60
MISSOURI	159,327	62,196	37,729	5,043	264,295	439,698	60
WISCONSIN	106,946	40,233	38,970	3,049	189,198	326,652	58
S. DAKOTA	11,185	6,813	160	-	18,156	31,435	58
IDAHO	8,052	6,063	11,683	-	25,798	45,320	57
MINNESOTA	104,881	36,947	38,748	3,601	184,177	332,197	55
TENNESSEE	48,602	37,636	72,972	-	159,210	300,787	53
MONTANA	22,288	17,925	2,590	1,234	44,037	82,468	53
IOWA	94,431	40,214	62,359	424	197,428	378,610	52
NEBRASKA	54,271	25,598	28,429	-	108,298	215,369	50
OREGON	19,028	12,289	13,296	-	44,613	93,715	48
UTAH	40,132	13,556	3,618	-	57,306	122,358	47
VERMONT	843	348	29	-	1,220	2,619	47
WASHINGTON	32,844	19,969	22,141	-	74,954	159,100	47
WYOMING	12,775	8,797	13,077	-	34,649	75,417	46
GEORGIA	89,217	33,939	44,568	-	167,724	368,446	46
N. CAROLINA	26,435	16,239	26,970	3	69,647	157,610	44
CALIFORNIA	585,471	177,693	86,922	32,014	882,100	2,177,896	41
ARIZONA	31,763	18,813	23,854	4,876	79,106	215,375	37
S. CAROLINA	24,580	7,737	18,916	-	51,233	161,523	32
KANSAS	95,099	34,287	56,934	7,319	193,639	602,834	32
NEW MEXICO	23,831	10,511	4,717	8,322	47,381	167,263	28
UNITED STATES*	4,941,265	1,958,925	5,942,153	1,919,145	14,761,488	21,392,314	69

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APPENDIX C - CALENDAR YEAR 1970
DENVER RESEARCH INSTITUTE, UNIVERSITY OF DENVER, DENVER, COLORADO

* ALASKA AND HAWAII OMITTED

APPENDIX N

JURISDICTION OF FEDERAL POWER COMMISSION OVER CERTAIN INTERSTATE SALES OF NATURAL GAS

Mr. MAGNUSON, Mr. President, by request, I introduce, for appropriate reference, a bill to amend the Natural Gas Act to vest jurisdiction in the Federal Power Commission over certain interstate sales of natural gas for industrial use. I ask unanimous consent that a letter from the Chairman of the Federal Power Commission, requesting the proposed legislation, be printed in the RECORD.

The VICE PRESIDENT. The bill will be received and appropriately referred; and, without objection, the letter will be printed in the RECORD.

The bill (S. 1734) to amend the Natural Gas Act to vest jurisdiction in the FEDERAL POWER COMMISSION over certain interstate sales of natural gas for industrial use, introduced by Mr. Magnuson, by request, was received, read twice by its title, and referred to the Committee on Commerce.

The letter presented by Mr. Magnuson is as follows:

FEDERAL POWER COMMISSION

Washington, D.C., June 12, 1963.

HON. LYNDON B. JOHNSON,
President of the Senate,
Washington, D.C.

DEAR MR. PRESIDENT: I am submitting herewith as part of the Commission's 1963 legislative program a

proposed amendment to section 1 of the Natural Gas Act to give the Federal Power Commission jurisdiction over direct interstate sales of natural gas by producers and by pipelines to industrial consumers. Most industrial consumers purchase natural gas from local distribution companies which, in turn, purchase if from interstate pipelines for distribution to residential, commercial, and industrial customers. Not infrequently, however, industrial customers buy from the pipeline directly or in some instances directly from a producer with a pipeline providing merely a transportation function.

Under existing law the Commission's authority is limited to sales for resale in interstate commerce: hence, *the price and other terms of a direct sale by a pipeline to an industrial consumer are outside the sphere of this Commission's regulatory authority.* Similarly, existing law can be construed to permit a natural gas producer to escape the Commission's rate jurisdiction by contracting directly with industrial consumers and having a new or existing pipeline transport gas for the producer's account.[1] As explained more fully below, this gap in the Commission's jurisdiction has not been closed by adequate State regulation. *As a result, the pipeline companies have set industrial gas prices to some industrial customers at levels exceeding costs plus reasonable profits, and are free to discriminate between industrial customers. And natural gas producers seeking to escape the Commission's jurisdiction have attempted to*

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[1] See, *e.g., FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) (dictum); Southern California Edison Co., CPS-172, application filed Dec. 23, 1960. Order Permitting Withdrawal of Application and Terminating Proceeding issued Jan. 3, 1963; Gulf Pacific Pipeline Co., CP63-223, applications filed Feb. 12, 1963.

make direct industrial sales of gas which would be transported over pipelines serving only industrial customers, even though this may lead to uneconomic transportation and may divert natural gas resources from consumer markets where its use is most in the public interest.[2]

The Natural Gas Act has been construed to leave the States free to regulate direct industrial sales, but many simply do not do so. In several States, attempts by regulatory commissions to assert jurisdiction over these sales have been thwarted by the pipelines in the State courts which have held that interstate pipelines selling to individual consumers on a contract basis are not "public utilities"[3] or that such sales are not "intrastate".[4] Consequently, these courts have held, the transactions are beyond the reach of the State commissions. Even the States which do regulate direct pipeline industrial sales frequently

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[2] Southern California Edison Co., *supra*, note 1: Gulf Pacific Pipeline Co., *supra*, note 1.

[3] *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill. 2d 509, 116 N.E. 2d 394 (1953); *Public Utilities Commission v. Colorado Interstate Gas Co.*, 142 Colo. 361, 351 P.2d 241 (1960). See *Mississippi River Fuel Corp. v. Hoffman*, 4 Ill. 2d 468, 123 N.E. 2d 503 (1955); *City of St. Louis v. Mississippi River Fuel Corp.*, 97 P.2d 727 (8th Cir., 1938). Contra: *Re Panhandle Eastern Pipeline Co.*, 21 P.U.R. 2d 267 (1957) (Illinois Pub. Service Commission): *Re: Cities Service Gas Co.*, 1931 E. P.U.R. 11 (Mo. Public Service Commission).

[4] *Texas Gas Transmission Corp. v. Mississippi Public Serv. Comm'n.*, 241 Miss. 826, 133 So.2d 526 (1961); *United Gas Pipe Line Co. v. Mississippi Public Service Commission*, 241 Miss. 762, 133 So.2d 521 (1961).

only require that the pipelines file rates negotiated between them and industrial customers, but, at least in the absence of complaint, do not examine the contracts to see if they are fair, reasonable, and nondiscriminatory.[5] The absence of effective State regulation of these sales may reflect the difficulty a State commission would face in determining the portion of an interstate pipeline's total cost of service applicable solely to direct industrial sales made within the particular State. That determination would be extremely complex and time consuming.

This system invites discrimination between customers on the basis of bargaining power – one of the principal evils public utility rate regulation is designed to cure.

Since State regulation of these sales, in most cases, is either non-existent or ineffective, industrial rates charged by interstate pipelines are often much higher than could be justified by cost considerations. The attached schedule shows just how far out of line some pipelines' industrial sale prices are. Based on cost of service studies in connection with relatively recent rate cases, the figures show that seven out of eight major pipelines' revenues from industrial sales exceeded costs – including a reasonable return on investment – by amounts ranging downward from 57 percent. Only one company's revenues from such sales approximated costs (revenues were about 1½ percent greater) and one company's prices to its direct industrial customers

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[5] Minutes of the third meeting of the Federal Power Commission Natural Gas Advisory Council, Oct. 31, 1962, p. 3. A thorough search of reported State public utility commission decisions turned up only one case in which a State commission altered a rate an interstate pipeline charged an industrial customers.

yielded less than an adequate rate of return. The extent to which some industrial customers may have been required to pay prices higher than might have been the case had the Commission exercised jurisdiction over the ratio is suggested by one case where the company's rate for a sale subject to the jurisdiction of this Commission to a local distributor was 23.2 cents per thousand cubic feet while its rate for an unregulated direct sale to an industrial consumer was 45 cents per thousand cubic feet.[6]

In addition, very large percentage increases are sometimes forced upon industrial consumers: in one instance an industrial rate was raised almost 50 percent in 1 year.[7]

These facts strongly suggest that competition alone is often inadequate to prevent rates for industrial gas sales from rising beyond cost-justified levels. This is not surprising, since in some regions and for some purposes, gas is the only available or practical fuel[8] and a particular pipeline the only available supplier.

Not only is Commission jurisdiction over direct industrial sales necessary to protect industrial gas consumers, but it would also materially assist the Commission in better discharging its existing regulatory responsibilities.

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[6] *Panhandle Eastern Pipe Line Co.*, 21 P.U.R. 3d 267, 276 (1957). The rate to the distributor should be somewhat lower to reflect certain economies. However, the magnitude of the difference is probably out of proportion to that which could be justified by cost considerations.

[7] *Public Utilities Commission v. Colorado Interstate Gas Co., supra*, note 3.

[8] See, e.g., *Public Utilities Commission v. Colorado Interstate Gas Co., supra*, note 3, at 255.

One such responsibility is to make sure that wellhead prices for gas flowing in interstate commerce are "just and reasonable." Where producers make direct industrial sales outside the Commission's jurisdiction, the prices they receive are apt to exceed the Commission's area rate ceiling.[9] *It is easy to understand that this gap in the statutory scheme for producer rate regulation provides an artificial incentive to producers to sell gas directly for industrial use rather than to pipelines for sale ultimately to domestic as well as industrial consumers.* These above-ceiling sales also exert an inflationary pressure on jurisdictional sales by producers and may lead to widespread price increase under existing contracts for gas already flowing subject to the Commission's jurisdiction. This is because many existing contracts provide for price increases in the event a producer in the area receives a higher price than the seller is currently receiving from an interstate, jurisdictional pipeline.[10] As a result, unregulated direct industrial sales by producers may lead to increases in the prices of gas paid by pipelines and, ultimately by residential, commercial, and industrial customers whom the Natural Gas Act seeks to protect.

Another problem which would disappear if the Commission had jurisdiction over direct sales to industrial customers is the practice of some pipelines to refuse to deliver

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9 See authorities cited at note 1, *supra.*

10 See, *e.g., Shell Oil Co.*, Docket No. R161-515, Opinion No. 382 (decided Mar. 15, 1963), where new purchases from producers in west Texas were alleged to have triggered price increases under El Paso Natural Gas Co.'s contracts with other producers. The increase to which these producers were alleged to have become entitled, in turn, allegedly triggered price escalation clauses in a contract between El Paso and still another producer. See also *Pure Oil Co.*, 25 FPC 383, 387-91 (1961).

additional gas to local distributors for resale in order to sell it directly to industrial consumers.[11] Since the unregulated direct sale can frequently be made at higher rates, the reason for the pipeline's preference is obvious. *But this practice often may not be in the public interest. In the first place, it means that less gas is available for resale to consumers for home heating – a use which the Commission, with court approval,*[12] *has found may frequently be the best use for natural gas.*

Finally, direct industrial sales by pipelines or producers may, on occasion, prevent local distributors from making industrial sales within their service areas. These sales benefit home-heating customers by enabling local distributors to make sales during off-peak periods (*i.e.*, when warm weather reduces demand for space heating), and thus to spread the cost of their distribution facilities and those purchased gas costs which do not vary with the amount

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[11] The problem is illustrated by the proceedings in *Arkansas-Louisiana Gas Co.*, Opinion No. 355, Apr. 18, 1962, 27 FPC 697, reversed *sub nom Granite City Steel Co. v. F.P.C.*, C.A.D.C. Nos. 17150, 17151, May 23, 1963. Extension of the time in which to seek rehearing has been requested. There a group of Mississippi's distributor customers sought to compel the pipeline to sell them additional gas which it was making available to direct industrial customers at rates not subject to Commission jurisdiction and exceeding those the Commission permitted Mississippi to charge its distributor customers. *The Commission's order allocating additional gas to the distributors was set aside on review.*

[12] *F.P.C. v. Transcontinental Gas Pipe Line Corp.*, *supra*, note 1.

taken[13] over a greater volume of sales. The cost per unit of gas that the residential and commercial space-heating customers must pay is, in turn, decreased. *Thus, Commission jurisdiction to regulate direct industrial sales by pipelines could put an end to the pipelines' preference for such sales over sales to local distributors for resale, thereby benefiting the natural gas consumers for whose protection the Natural Gas Act was passed.*

For these reasons – protection of industrial consumers, prevention of widespread field price increases under existing contracts, and removal of present incentives to withhold gas from local distributors in order to make it available for direct industrial sales – the Commission strongly recommends that it be given jurisdiction over direct industrial sales by natural gas companies. This authority will enable the Commission to require that interstate industrial gas sales will be made at such prices *and on such terms* as to realize the potential benefits of such sales to both industrial and domestic consumers.

Commissioner O'Connor has asked me to note his opposition to this proposal.

Sincerely,

JOSEPH C. SWIDLER,
Chairman

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[13] Many pipeline rate schedules provide for both a commodity charge – so much for each unit of gas taken – and a demand charge – so much for each unit of gas that the pipeline stands ready to deliver. The latter charge does not vary with the volume of gas the distributor actually uses.

Note: Emphasis added.

APPENDIX G

EXCERPT FROM APPELLANT'S BRIEF IN
PANHANDLE EASTERN PIPE LINE CO. v.
PUBLIC SERVICE COMMISSION OF INDIANA,
332 U.S. 507

More important, with respect to the question presented here, however, is the conclusion of the court below that as a public utility, appellant will be obligated to serve all who apply and will not be permitted to select its customers. If this is true in Indiana, it is also true in each of the several states in which appellant operates. It is inconceivable that regulation of this character can fail to bring about not only conflicts between the states but conflicts between the states and the Federal Power Commission.

As shown by the record (ante, p. 14) substantially all industrial consumers' contracts are on an interruptible basis and the service is curtailed when the supply would be insufficient to supply the firm commitments of local distributing companies for domestic and commercial customers. There is uncontroverted evidence that any curtailment program must be based on the operation of the pipeline system as an entirety (R 174, 175). Moreover the provisions of the Natural Gas Act giving the Federal Power Commission jurisdiction over the construction of facilities for the interstate transportation of natural gas make it extremely doubtful whether appellant could, if ordered to do so by a state commission, enlarge its

interstate transportation facilities in order to serve new industrial customers without authorization from the Federal Power Commission. (As stated ante, p. 10, such a certificate was applied for and issued with reference to the DuPont service over the objection of the appellee Commission.)

The Federal Power Commission has also asserted the right to prevent a pipe line company from serving new customers, even though additional transportation facilities are not required if that Commission determines that such service would impair ability to render satisfactory service to existing customers. (Emphasis Added.)

APPENDIX P

Comparison of Curtailment Provisions of United's FPC Gas Tariff in Effect Until November 14, 1971 and Typical United Direct Sale Contract

United Gas Pipe Line Company FPC Gas Tariff First Revised Volume No. 1 General Terms and Conditions Original Sheet No. 71, First Revised Sheet No. 72	Typical United Direct Sale Article IX
"12. IMPAIRMENT OF DELIVERIES	"IMPAIRMENT OF DELIVERIES
12.1 *Proration of Impaired Deliveries*—Seller delivers gas to (a) gas utilities, and pipeline companies which deliver gas to gas utilities, for resale to domestic and industrial consumers, (b) steam electric power plants for use in generating electricity which is sold to domestic consumers, and (c) industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its consumers, then, Seller may, without liability to Buyer, prorate its gas supply in the manner hereinafter set forth after first making allowance for all gas required by Seller for the operation of any of its facilities. The gas requirements of gas utilities, and pipe line companies delivering gas to gas utilities, which sell gas to domestic consumers (but only to the extent of gas required for resale to such domestic consumers) shall first be supplied by Seller. If Seller is unable to supply gas for all the require-	Buyer specifically recognize the fact that Seller delivers ga to gas utilities for resale to do mestic consumers and to publi utility power plants for genera tion of electricity which is sol to domestic consumers. In th event a shortage of gas render Seller unable to supply the fu gas requirements of all its co sumers, then it is mutuall agreed that the gas requirement of gas utilities selling gas to do mestic consumers and publi utility power plants using ga for generation of electricit which is sold to domestic co sumers shall first be supplied b Seller, and the remaining avai able gas shall be prorated b Seller among its other contra consumers, including Buyer."

ments of such gas utilities and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then gas for such requirements shall be supplied ratably. In the event Seller is able to supply gas for all the requirements of such gas utilities, and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then there shall next be supplied the gas requirements of steam electric power plants using gas for the generation of electricity which is sold to domestic consumers, whether such power plants purchase their requirements from Seller or from gas utilities or from pipe line companies, purchasing their requirements from Seller; and, if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. After the above requirements have been supplied, the remaining gas supply, if any, shall be prorated by Seller among its other customers, to the extent of gas sold by them to their other consumers. In the event of any shortage of gas as in this Section provided, Buyer shall discontinue service of gas to its consumers during the period of any such shortage to the extent which may be necessary consistent to the provisions hereof.

In certain instances Seller supplies less than the full re-

quirements of certain of its customers, and there may be times when Seller supplies less than the full requirements of Buyer hereunder and it is the intent of this Section that any priority granted hereunder shall run only to that part of the requirements of each ultimate consumer as is being currently supplied by gas furnished by Seller, directly or indirectly."

APPENDIX Q

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LOUISIANA PUBLIC SERVICE COMMISSION, Plaintiff, v. UNITED GAS PIPE LINE COMPANY; PENNZOIL UNITED, INC.; CHAIRMAN JOHN N. NASSIKAS, COMMISSIONER JOHN A. CARVER, JR., COMMISSIONER ALBERT B. BROOKE, JR., COMMISSIONER PINKNEY WALKER; AND COMMISSIONER RUSH MOODY, JR., FEDERAL POWER COMMISSION, Defendants.	)	CIVIL ACTION NO. _____

COMPLAINT

FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY AND PERMANENT INJUNCTION

Now comes Louisiana Public Service Commission (LPSC) and for its complaint against the defendants, United Gas Pipe Line Company (United), Pennzoil United, Inc. (Pennzoil), and the Chairman and individual Commissioners of the Federal Power Commission (FPC), respectfully alleges:

THE PARTIES

1. Plaintiff, LPSC, is an agency of the State of Louisiana, charged by the laws of Louisiana with the authority and duty, inter alia, of regulating the rates and services of gas and electric utilities in that state, and with exercising general supervision over such utilities, and, in addition, with protecting the interests of gas and electric consumers in the State of Louisiana. (Article VI Section 4 of the Louisiana Constitution, as amended in 1964, and Title 45 of the Louisiana Revised Statutes). The LPSC is a separate entity which may sue and be sued.

2. Defendants, United and Pennzoil, are corporations, duly organized and existing under and by virtue of the laws of the State of Delaware, and having their principal places of business

in the State of Texas.

3. The Federal Power Commission is an administrative agency established by Congress to regulate certain aspects of the transportation and sale of natural gas in interstate commerce and natural gas companies engaged therein. It has no jurisdiction over intrastate sales or transportation of natural gas, or over rates and services of an intrastate gas pipeline. The named Chairman and Commissioners are the members of said Commission and have been individually joined as defendants because they are acting beyond the scope of their duly granted statutory authority under the Natural Gas Act.

JURISDICTION

4. This Court has jurisdiction under 28 U.S.C. Sec. 1332, because this is a civil action in which the matter in controversy exceeds the sum or value of $10,000.00 and is between citizens of different states.

INTEREST OF THE PLAINTIFF

5. Plaintiff appears to protect the interests of the ultimate consumers of natural gas supplied by United which is used for residential, commercial and industrial purposes within Louisiana. In 1970, United supplied 47.5% of all natural gas consumed within the state. Some 380 cities and towns and 94 industrial customers in Louisiana are wholly dependent upon it for their natural gas requirements. Approximately 2,219,000 Louisiana residents depend upon United for gas used for space heating, cooking and water heating.

6. United directly serves 63 privately and municipally owned gas distribution systems in Louisiana. It also supplies United Gas, Inc. which owns and operates another 84 distribution systems within the state. The rates and services of all of these local utilities are regulated by LPSC.

7. Louisiana is the largest gas exporting state and the second largest gas producing state in the nation. In 1969, it delivered to other states 48% of all natural gas exported by gas producing states to meet the needs of other states which cannot supply their own requirements. Over 73% of its total production was exported to other states, on a net delivery basis (after subtracting interstate receipts from gross deliveries) in that year.

8. In 1970, United purchases 1,098,504,532 mcf in Southern Louisiana of which it used only 203,643,624 mcf, or 20%, in the New Orleans district (Green System). This figure is derived from Exhibit No. 32 in FPC Docket No. CP71-89 which has been attached as Appendix A to this Complaint. This Exhibit compares for the years 1962 through 1970, inclusive, the total gas purchased by United in Southern Louisiana, the annual volume of intrastate sales in its Old District 5 which is essentially the Green System and the gas purchased in Louisiana but sold outside the Green System.

9. United is not a typical interstate pipeline. It has singular and unique characteristics which are the direct and proximate cause of its curtailment of its Louisiana resale and direct sale customers, both those served from its interstate system and those served from its intrastate system in southern Louisiana, (the Green System and Purple System). United performs the same role as other interstate pipelines by serving as a supplier of gas sold at resale by municipally and privately owned gas distribution utilities in the Gulf Coast states and also supplies gas to power plant customers and direct industrial customers in such states who consume it for their own use. However, its major and predominant role is to act as a gigantic gas gatherer collecting gas from the producing areas in the Southwestern United States which it sells to, or transports for, five major interstate pipeline. It is, in terms of volume, the world's largest transporter of natural gas and

its system purchased, gathered and transported more than 1.8 trillion cubic feet in 1970.

10. Louisiana is a producing state which exports vast quantities of gas to other states. United's gas shortage does not therefore reflect any imbalance between the requirements of its Louisiana customers and locally produced gas. Rather, it results from this pipeline's deliberate management decision to use ever-increasing quantities of Louisiana produced gas to meet the needs of its interstate customers. Using 1960 as a base year, United increased its exports of Louisiana gas by 6.5% in 1965. By 1970, this percentage had increased to 62%. This trend has been continuing at an accelerating pace and if the FPC succeeds in usurping plaintiff's lawful and continuing jurisdiction over United's separate intrastate pipeline syste, exports will progressively increase and deliveries to United's Louisiana customers will be correspondingly reduced. United is a wholly-owned subsidiary of Penngoil. As the Fifth Circuit ruled in Louisiana Power & Light Co. v. United Gas Pipe Line Company, et al. and Federal Power Commission No. 71-1773, on January 14, 1972, United controlled, through an affiliate, gas wells in Louisiana which produced more than the entire amount of gas deliberately and unnecessarily injected into the separate Green System in 1970 which could have been used in Louisiana (Slip Op. p. 23).

NECESSITY FOR INJUNCTIVE RELIEF

11. On September 28, 1971, plaintiff adopted its Special Order No. 7-71,*/ (Appendix B), instituting a comprehensive examination and investigation of United's rates and services on its

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*/ Subsequently, LPSC issued Special Orders 17-71 and 21-71 (Appendices C & D).

intrastate pipeline facilities and systems in southern Louisiana, including curtailment practices and delivery volumes. This Order expressly prohibited further commingling by United of interstate or offshore gas with intrastate gas and further interconnections between its interstate system and its intrastate system or that of other pipelines or any out of state distributors or producers or intrastate pipelines, distributors or producers unless it first obtained the permission of the LPSC. This prohibition was applicable until the final conclusion of this LPSC proceeding, including all phases of court review. Its purpose was to preserve the status quo during the pendency of litigation concerning the question of whether the FPC or the LPSC had jurisdiction over United's separate intrastate system.

12. United, under the inducement, direction and control of Pennzoil, has been injecting ever-increasing quantities of interstate and offshore gas into its Green System as shown by the FPC's findings in Opinion No. 610 under the heading "The Unauthorized Gas Flows Establish Jurisdiction" (Slip Op., pp. 8-13). */

13. Opinion No. 610 unlawfully ousts plaintiff of its jurisdiction over United's Green System; remands the proceeding to an FPC Examiner for receipt of additional evidence to lay the foundation for unlawfully discriminating against intrastate resale and direct customers served from that system; compels them to pay higher rates in violation of their service agreements and direct sales contracts and provides that they shall continue to be served only on an emergency basis and illegally subjects them to the conditions that United's intrastate facilities be operated as part of its integrated interstate system and that its customers submit to the Commission's jurisdiction, in all respects, pending its final decision in the remanded proceedings which are certain to be of prolonged duration.

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*/ (Appendix E)

14. The judgment of the Fifth Circuit Court of Appeals that the Ocean System is an intrastate pipeline subject only to state jurisdiction constitutes a full adjudication of this issue by a court of competent jurisdiction. It is binding on United, Pennzoil and the FPC which were all parties to Civil Action No. 1663-69 before this Court. Until that judgment is vacated, the FPC lacks authority to make any substantive orders which are inconsistent therewith. Therefore, issuance of FPC Opinion No. 610 on February 9, 1972 after the Fifth Circuit decision became binding under the principles of res judicata and estoppel by judgment was illegal and an ultra vires act by the named defendant Commissioners.

IRREPARABLE INJURY

15. Plaintiff initiated its currently pending comprehensive investigation of United and made its express prohibition against further commingling and interconnections in order to preserve the status quo during the pendency of Court litigation concerned with whether the federal or state agency has jurisdiction over United's separate intrastate pipeline systems in southern Louisiana. Unless enjoined, Opinion No. 610 by authorizing and directing United to take such prohibited action, will vitiate and destroy the effectiveness of the LPSC order. Furthermore, Opinion No. 610 (Slip Op. Par. 53, p. 18) squarely holds that the FPC's jurisdiction under the Natural Gas Act attaches even when the commingling of interstate and intrastate gas and any operational integration between United's interstate and intrastate system results from the deliberate and unlawful action of the pipeline, contrary to both the Natural Gas Act and the order of the LPSC. While plaintiff disagrees with this legal conclusion, it should not be subjected to the material risk that the courts will uphold the FPC's position in which case United's unlawful actions, aided and abetted by the equally unlawful actions of the individual

members of the Commission, will have completely and permanently usurped the LPSC's lawful and continuing jurisdiction.

16. The rates lawfully prescribed by LPSC are legislative future acts, which it has been delegated authority to perform by the state legislature, which cannot be neutralized and vitiated by the unilateral action of a regulated company in filing higher company-made rates. Under the Fifth Circuit's binding judgment, plaintiff has exclusive jurisdiction to fix rates and charges for the sale of gas by United to its resale utility customers served by Green System facilities.

17. The FPC concedes that its curtailment jurisdiction is utterly dependent upon its certificate jurisdiction. This, the FPC cannot enforce United's curtailment program against Green System customers if such facilities are intrastate in nature and beyond the scope of its statutory powers. By the same token, the FPC cannot compel such customers to pay United rates and charges which are substantially in excess of the just and reasonable rates lawfully prescribed by LPSC. At present, the Green System is an intrastate pipeline subject exclusively to the regulatory jurisdiction of plaintiff. Opinion No. 616 makes it manifest that an assumption of jurisdiction by the FPC will deny Green System customers equality with other existing customers served by United's interstate system; abrogate their service agreements and direct sales contracts and compel them to pay substantial rate increases, in advance of any FPC determination of their lawfulness.

18. The damages which will be suffered by the economy of the state and the welfare of its citizens are incalculable in monetary terms and of a type which cannot be remedied by an award of damages. Since Louisiana is a producing state which has always enjoyed an assured and abundant supply of gas its industries and economic welfare are abnormally and heavily dependent upon

continued access to this natural resource of the state. Last, but not least, an assumption of jurisdiction by the FPC will increase the use of this local resource to serve the needs of other states. So long as the Green System remains an intrastate pipeline, the LPSC can take appropriate action on the basis of record evidence to insure that a larger and fairer share of Louisiana gas is used within the state.

19. Consequently, the LPSC, resale customers and direct customers of United served by the Green System and the ultimate end users of gas within the state will be substantially, permanently and irreparably damaged unless United, Pennzoil and the members of the FPC are enjoined.

PRAYER

Accordingly, LPSC invokes the provisions of 28 U.S.C. Sec. 1332, as well as this Court's general equity jurisdiction, and respectfully requests that the Court:

(a) Issue a temporary restraining order, in accordance with Rule 65 of the Federal Rules of Civil Procedure, in the form attached hereto, and

(b) Issue a preliminary injunction in accordance with Rule 65 of the Federal Rules of Civil Procedure pending a hearing on LPSC's Application for Permanent Injunction, and

(c) Issue its permanent injunction, which respectively shall, until such time as the judgment of the Fifth Circuit Court of Appeals in No. 71-1773 respecting the intrastate nature of the Green System may be vacated:

Restrain and enjoin United and Pennzoil from operating its Green System intrastate pipelines as part of its integrated interstate pipeline system and ordering said

companies to operate such pipelines so as to maintain and perpetuate their intrastate nature in accordance with applicable orders of LPSC.

Restrain and enjoin the individual members of the FPC from authorizing or directing United to serve its Green System customers only on an emergency basis and subject to the condition that these facilities be operated as part of its integrated interstate pipeline system, be fully subject ot its exclusive jurisdiction and subject to curtailment under United's tariff and subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder, pending the issuance of a final decision in the remanded proceedings in Docket No. CP71-89; and from granting any presently pending or subsequently filed applications for certificates of public convenience and necessity which would be inconsistent with said applicable orders of LPSC and said persons are hereby affirmatively directed to authorize United to fully continue the service rendered to its Green System customers prior to the issuance of Opinion No. 610.

(d) Grant such other and further relief at law or in equity as the Court may deem just and proper.

LOUISIANA PUBLIC SERVICE COMMISSION

By: /S/ Joseph H. Kavanaugh
Joseph H. Kavanaugh

ATTORNEY FOR LOUISIANA PUBLIC SERVICE COMMISSION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LOUISIANA PUBLIC SERVICE COMMISSION,

Plaintiff,

v.

UNITED GAS PIPE LINE COMPANY; PENNZOIL UNITED, INC.;

CHAIRMAN JOHN N. NASSIKAS, COMMISSIONER JOHN A. CARBER, SR., COMMISSIONER ALBERT B. BROOKE, JR., COMMISSIONER PINKNEY WALKER, AND COMMISSIONER RUSH MOODY, JR., FEDERAL POWER COMMISSION,

Defendants.

CIVIL ACTION NO. _____

TEMPORARY RESTRAINING ORDER

This cause came on to be heard on the verified complaint of plaintiff and the certificate of Joseph H. Kavanaugh, Esq., Attorney for plaintiff, and it appearing to the Court that the defendants are committing acts, and are about to commit acts as set forth in plaintiff's complaint, and will continue to do so unless restrained by order of this Court, and that immediate and irreparable injury, loss or damage will result to plaintiff before notice can be given and the defendants and their attorney or attorneys can be heard in opposition to the granting of a temporary restraining order; and that the Fifth Circuit Court of Appeals entered a judgment in Louisiana Power and Light Company v. United Gas Pipe Line Company, et al. and Federal Power Commission, No. 71-1273, on January 14, 1972, that United's Green System is an intrastate pipeline not subject to regulation by the Federal Power Commission; and it further appearing that the individual members of said Commission have committed an ultra vires act in issuing the findings and ordering clauses of Opinion No. 610 on February 9, 1972 insofar as it pertains to

said Green System; and it further appearing that the Louisiana Public Service Commission in its Special Order 17-71, as modified by Special Order 27-71, respectively issued on September 28, 1971 and November 29, 1971 has prohibited United Gas Pipe Line Company from further commingling interstate or offshore gas with intrastate gas and further interconnecting its interstate system and its intrastate system or that of other pipelines or any out of state distributor or producers or intrastate pipelines, distributors or producers unless it first obtains the permission of the Louisiana Public Service Commission; and it further appearing that unless restrained by this Court defendants United and Pennzoil with the authorization and by the direction of the FPC will vitiate and destroy the effectiveness of this prohibition and expose Green System customers and ultimate end users of gas within Louisiana to a material risk that this intrastate pipeline will become an interstate pipeline to their great and permanent detriment and prejudice, and to the continuing detriment and prejudice of the economy of Louisiana and the welfare of its citizens;

IT IS THEREFORE ORDERED that United Gas Pipe Line Company, its officers, agents, representatives, employees, attorneys, and all persons in active concert and participation with it, including its parent company, Pennzoil United, Inc. be and they hereby are restrained from in any manner either directly or indirectly operating the Green System intrastate pipelines as part of United's integrated interstate pipeline system in violation of the said Special Orders of the Louisiana Public Service Commission, and said persons are hereby affirmatively directed to operate such pipelines so as to maintain and perpetuate their intrastate nature in accordance with said orders and any lawful later orders which may be made;

IT IS THEREFORE FURTHER ORDERED that Chairman John E. Bassikas, Commissioner John A. Carver, Jr., Commissioner Albert

B. Brooke, Jr., Commissioner Pinkney Walker, and Commissioner Rush Moody, Jr., of the Federal Power Commission be and they hereby are restrained from in any manner either directly or indirectly authorizing or directing United to serve its Green System customers only on an emergency basis and subject to the condition that these facilities be operated as part of its integrated interstate pipeline system, be fully subject to its exclusive jurisdiction and subject to curtailment under United's tariff and subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder, pending the issuance of a final decision in the remanded proceedings in Docket No. CP71-89, and from granting any presently pending or subsequently filed applications for certificates of public convenience and necessity which would be inconsistent with said applicable orders of Louisiana Public Service Commission, and said persons are hereby affirmatively directed to authorize United to fully continue the service rendered to its Green System customers prior to the issuance of Opinion No. 610.

IT IS THEREFORE FURTHER ORDERED that plaintiff first give security in the sum of $5,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, such bond to be approved by the Court or by the Clerk of the Court; and

IT IS FURTHER ORDERED that this Order expire within _____ days after entry unless within such time as the Order for good cause shown is extended, or unless the defendant consent that it may be extended for a longer period; and

IT IS FURTHER ORDERED that plaintiff's application for a preliminary injunction be sent down for hearing on the _____ day of _____, 1972 at _____ A.M. at _____, Louisiana; and

IT IS FURTHER ORDERED that copies of this order and of plaintiff's complaint and supplemental complaint and the attachments submitted therewith, together with proper summons issued by the Clerk of this Court, be immediately served by the United States Marshal

upon the defendants.

Issued at _____, Louisiana, February _____, 1972 at _____ o'clock .M.

_____

UNITED STATES DISTRICT JUDGE.

APPENDIX R

LOUISIANA PUBLIC SERVICE COMMISSION

SPECIAL ORDER NO. 7-71

AT A SESSION OF THE LOUISIANA PUBLIC SERVICE COMMISSION ON SEPTEMBER 29, 1971, CONSIDERATION WAS GIVEN TO THE FOLLOWING FACTS:

UNITED GAS PIPELINE COMPANY (UNITED) HAS TAKEN CERTAIN ACTIONS WHICH HAVE ALREADY SUBSTANTIALLY IMPAIRED, AND WILL PLACE IN EVEN GREATER FUTURE JEOPARDY, THE SUPPLY, TRANSMISSION, AND DISTRIBUTION OF A RELIABLE AND ADEQUATE QUANTITY OF GAS FOR USE BY DOMESTIC, COMMERCIAL, AND INDUSTRIAL CONSUMERS IN THE STATE OF LOUISIANA PURCHASING DIRECTLY FROM UNITED, AND WHICH ALSO SUBJECT FIRM CUSTOMERS IN THIS STATE TO SUBSTANTIAL CURTAILMENTS AND REDUCED DELIVERIES WHILE UNFAIRLY ALLOWING ITS INTERSTATE PIPELINE CUSTOMERS AND THEIR FIRM AND INTERRUPTIBLE CUSTOMERS LOCATED IN OTHER STATES TO RECEIVE UNINTERRUPTED AND NORMAL GAS DELIVERIES DURING BOTH SUMMER AND WINTER MONTHS.

IT APPEARING THAT:

1. THE FEDERAL POWER COMMISSION NOW HAS PENDING BEFORE IT A CERTIFICATE PROCEEDING IN DOCKET NO. CP71-89 WHICH MAY RESULT IN THE TOTAL PREEMPTION OF THIS COMMISSION'S JURISDICTION OVER UNITED'S INTRASTATE SYSTEM AND A CONSOLIDATED CURTAILMENT PROCEEDING IN DOCKET NOS. RP71-29 AND RP71-120 WHICH MAY SUBJECT ALL OF UNITED'S DIRECT LOUISIANA CUSTOMERS, WHO HAVE NO OTHER SOURCE OF GAS SUPPLY, TO SEVERE AND UNDUE PREJUDICE AND DISADVANTAGE AND TO UNREASONABLE DIFFERENCES BETWEEN LOCALITIES IN THIS STATE AND IN OTHER STATES.

2. UNITED SUPPLIES 47.5% OF ALL NATURAL GAS USED IN LOUISIANA.

3. THE FEDERAL POWER COMMISSION HAS MADE EFFECTIVE, DURING THE PENDENCY OF THE ABOVE-MENTIONED PROCEEDINGS, THE CURTAILMENTS, REDUCED DELIVERIES, AND RATE INCREASES PROPOSED BY UNITED BEFORE REACHING ANY CONCLUSION THAT IT HAS NECESSARY AUTHORITY TO PERMIT UNITED TO RELIEVE ITSELF OF THE LAWFUL, AND CONTINUOUSLY EXERCISED JURISDICTION OF THIS COMMISSION.

4. UNITED SEEKS TO INVOKE THE AID OF THE FEDERAL POWER COMMISSION IN ORDER TO UNILATERALLY AND UNLAWFULLY ABROGATE FIRM, FIXED-PRICE, DIRECT SALES CONTRACTS WITH LOUISIANA CUSTOMERS.

5. UNITED HAS ADEQUATE GAS RESERVES TO SERVE ITS INTRASTATE SYSTEM WHICH IT SEEKS TO INEQUITABLY, UNJUSTLY, AND UNLAWFULLY DIVERT TO ITS INTERSTATE PIPELINE SYSTEM TO THE SEVERE AND IRREPARABLE DAMAGE AND INJURY OF ALL CLASSES OF ITS LOUISIANA CUSTOMERS.

6. REVIEW OF THE BRIEFS FILED BY THE PARTIES TO THE ABOVE-MENTIONED FPC PROCEEDINGS HAS LED THIS COMMISSION TO CONCLUDE THAT MANY MATERIAL AND CRITICALLY IMPORTANT FACTORS ARE NOT INCLUDED IN EITHER THE SCOPE OF THE ISSUES DEFINED BY THE FEDERAL POWER COMMISSION, OR BY THE EVIDENCE PRESENTED IN SUCH PROCEEDINGS.

NOW, THEREFORE, IT IS ORDERED THAT:

A. THE COMMISSION HEREBY INSTITUTES, PURSUANT TO ARTICLE 6, SECTIONS 4, 5, AND 6, OF THE LOUISIANA CONSTITUTION OF 1921, AS AMENDED, AND ALL PERTINENT PROVISIONS OF THE LOUISIANA REVISED STATUTES OF 1950, AS AMENDED, A PROCEEDING

ENTITLED, "EXAMINATION AND INVESTIGATION OF THE RATES, SERVICES, AND CURTAILMENT PRACTICES OF THE INTRASTATE PIPELINE SYSTEM OF UNITED GAS PIPE LINE COMPANY." THIS PROCEEDING SHALL ENCOMPASS A COMPLETE, COMPREHENSIVE, AND DETAILED EXAMINATION AND INVESTIGATION OF THE ACTIVITIES AND OPERATIONS OF UNITED, AND TO THE EXTENT RELATED THERETO, THOSE OF ITS PRODUCTION AFFILIATES, PENNZOIL PRODUCTION COMPANY, AND JOINT PRODUCTION VENTURES SUCH AS POGO AND SEA ROBIN, ITS PARENT, PENNZOIL UNITED, INC., AND ITS AFFILIATED DISTRIBUTION OUTLET, LATEX GAS, INC., IN PRODUCING, GATHERING, TRANSPORTING, SELLING, AND DISTRIBUTING, GAS PURCHASED OR PRODUCED WITHIN THE STATE OF LOUISIANA. THE PURPOSES TO BE SERVED BY THIS PROCEEDING ARE TO FIX AND REGULATE THE RATES CHARGED AND TO BE CHARGED, INCLUDING DEMAND CHARGES AND PENALTIES ON OVERRUNS, BY UNITED, AND TO FIX AND REGULATE THE SERVICES, INCLUDING CURTAILMENT PRACTICES AND GAS DELIVERY VOLUMES, RENDERED BY UNITED. THE COMMISSION WILL MAKE APPROPRIATE FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ENTER ANY REMEDIAL ORDERS REQUIRED BOTH ON AN INTERIM BASIS AND AT THE CONCLUSION OF THIS PROCEEDING.

B. THE PROCEEDING SHALL INCLUDE, AMONG OTHERS, CONSIDERATION OF THE FOLLOWING SPECIFIC ISSUES:

I. WHETHER THIS COMMISSION'S JURISDICTION MAY LAWFULLY BE PREEMPTED BY THE FEDERAL POWER COMMISSION AND THE SELF-SERVING UNAUTHORIZED ACTIONS OF UNITED?

II. THE IMPACT OF AN ASSUMPTION OF JURISDICTION BY THE FEDERAL POWER COMMISSION OVER THE WHOLE, OR ANY PART, OF UNITED'S INTRASTATE SYSTEM UPON ALL CLASSES OF UNITED'S DIRECT LOUISIANA CUSTOMERS AND UPON THEIR RESPECTIVE CUSTOMERS, AND UPON THE PRESENTLY ADEQUATE INTRASTATE GAS RESERVES.

III. THE NECESSITY FOR EXPRESS PROHIBITIONS AGAINST EXISTING AND FURTHER COMMINGLING OF INTERSTATE OR OFF-SHORE GAS WITH INTRASTATE GAS BY UNITED, AND AGAINST EXISTING AND FURTHER INTERCONNECTIONS BETWEEN ITS INTRASTATE SYSTEM AND ITS INTERSTATE SYSTEM, THE INTERSTATE SYSTEMS OF OTHER PIPELINES, OR WITH OUT-OF-STATE DISTRIBUTORS OR PRODUCERS OR INTRASTATE PIPELINES, DISTRIBUTORES OR PRODUCERS, AND

IV. ALL OTHER MATTERS AND THINGS CONNECTED WITH, CONCERNING, AND GROWING OUT OF THE RATES AND SERVICES OF UNITED OR UNITED, INC. WHICH ARE SUBJECT TO THE SUPERVISION, REGULATION, AND CONTROL OF THIS COMMISSION.

C. THIS COMMISSION HEREBY SETS 10:00 A.M., November 1, 1971, AS THE APPOINTED DATE FOR THE CONVENING OF AN INFORMAL PREHEARING CONFERENCE TO BE HELD AT THE COMMISSION'S OFFICES AT THE STATE CAPITOL BUILDING, BATON ROUGE, LOUISIANA TO DEAL WITH:

I. THE REQUEST OF THE COMMISSION STAFF FOR COMPREHENSIVE AND DETAILED INFORMATION, TO BE FURNISHED BY UNITED, AND,

II. TO ESTABLISH DEFINITELY THE NATURE AND SCOPE OF THE EVIDENCE TO BE PRESENTED BY UNITED.

D. UNITED SHALL MAKE AVAILABLE TO THE COMMISSION STAFF, ON THE DATE OF SUCH CONFERENCE INFORMATION PERTAINING TO THAT PORTION OF ITS SYSTEM OPERATIONS MORE FULLY DESCRIBED AS THE GREEN SYSTEM EAST, GREEN SYSTEM WEST, AND THE PURPLE SYSTEM, ("INTRASTATE SYSTEM"), ALL AS SHOWN ON THE MAPS SUBMITTED BY UNITED GAS PIPE LINE COMPANY IN ITS FILING IN DOCKET NO. CP71-89 EXHIBIT F, THIS INFORMATION CONSISTING OF THE ITEMS SPECIFIED IN APPENDIX A OF THIS ORDER.

APPENDIX A

THE INFORMATION ITEMS REQUESTED SHALL BE FURNISHED FOR UNITED'S SYSTEM, BE SEPARATELY STATED FOR THE "INTRASTATE SYSTEM" (AS DEFINED IN THIS ORDER) AND THE INTERSTATE SYSTEM AND REFLECT CONDITIONS AS OF October 10, 1966, WHEN THE UNITED STATES SUPREME COURT DENIED CERTIORARI IN FLORIDA PARISHES; AS OF SEPTEMBER 17, 1970, WHEN THE FPC REQUESTED UNITED TO FILE INFORMATION RESPECTING THAT DECISION AND AS OF OCTOBER 1, 1970, WHEN UNITED APPLIED TO THE FPC FOR CERTIFICATION OF ITS INTRASTATE SYSTEM, AND AS OF THE DATE OF THIS ORDER.

1. ALL SOURCES OF GAS SUPPLY, INCLUDING AFFILIATE PRODUCTION, PRODUCER PURCHASES, GAS IMPORTS AND OTHER PIPELINES.
2. ALL "INTERCONNECTIONS", AS DEFINED IN ORDERING PARAGRAPH (D) OF THIS ORDER.
3. SYSTEMWIDE FLOW CHARTS SHOWING ORIGIN AND DESTINATION OF GAS, PIPELINE TRANSMISSION CAPACITY AND COMPRESSION, DIRECTION OF GAS FLOW AND NET BALANCES, AND UNDERGROUND STORAGE CAPACITY.
4. COPIES OF ALL CONTRACTS WITH PRODUCERS CONTAINING RESTRICTIONS AGAINST THE COMMINGLING OF GAS SUPPLIED THEREUNDER WITH "INTERSTATE GAS" AND/OR "OFFSHORE GAS", AS DEFINED IN ORDERING PARAGRAPH (E) OF THIS ORDER.
5. CURRENTLY EFFECTIVE AND PLANNED CURTAILMENT PROGRAMS (INCLUDING INTERRUPTIBLE AND FIRM LOAD SHEDDING PRIORITIES) AND CURRENT STATUS OF AVAILABLE SUPPLIES WITHIN LOUISIANA WHICH COULD INCREASE THE DELIVERABILITY OF THE INTRASTATE SYSTEM.
6. SIX COPIES OF THE RESPONSE FILED BY UNITED TO THE INFORMATION REQUEST OF THE FPC IN PHASES I AND II OF DOCKET NO. R-405, CONCERNING "RELIABILITY OF ELECTRIC AND GAS SERVICE", ISSUED NOVEMBER 4, 1970.
7. SIX COPIES OF ALL RATE FILINGS TO THE FPC MADE BY UNITED FROM 1963 - 1971, INCLUSIVE.

WITH RESPECT TO ITEMS 1 AND 2, ABOVE, SHOW SEPARATELY FOR EACH RESPECTIVE SOURCE AND INTERCONNECTION: THE DATE OF CONSTRUCTION AND ATTACHMENT, ANY AUTHORIZATION BY OR PENDING APPLICATIONS BEFORE THE FPC, DATE OF ANY SUCH APPLICATION, DOCKET NO. AND CITATION OF ALL FPC ORDERS AND OPINIONS RELATING THERETO AND THE REASON FOR ATTACHMENT OF SUCH SOURCE OR INTERCONNECTION.

WITH RESPECT TO ALL ITEMS, EXCEPT ITEM 4, SHOW FOR EACH SOURCE AND PIPELINE AND ALL INTERCONNECTIONS THERETO, THE RESPECTIVE TAKES DURING THE SUSTAINED HIGHEST THREE DAY COINCIDENTAL AND NONCOINCIDENTAL PEAK, ANNUAL VOLUMES AND RESERVE LIFE INDEX.

E. UNTIL THE FINAL CONCLUSION OF THIS PROCEEDING (INCLUDING ALL PHASES OF COURT REVIEW), OR WITHOUT FIRST OBTAINING THE PERMISSION AND AUTHORIZATION OF THIS COMMISSION, UNITED SHALL NOT FURTHER COMMINGLE ANY "INTERSTATE" OR "OFFSHORE GAS" WITH INTRASTATE GAS AND SHALL NOT MAKE ANY FURTHER "INTERCONNECTIONS" BETWEEN ITS INTRASTATE SYSTEM AND ITS INTERSTATE SYSTEM, THE INTERSTATE SYSTEM OF OTHER PIPELINES, OR OF OUT OF STATE DISTRIBUTORS OF PRODUCERS OR INTRASTATE PIPELINES, DISTRIBUTORS OR PRODUCERS. FOR THE PURPOSES OF THIS PARAGRAPH, "INTERSTATE GAS" AND "OFFSHORE GAS" SHALL MEAN ANY GAS DELIVERIES OR GAS FACILITIES CERTIFICATED (TEMPORARILY OR PERMANENTLY) OR EXEMPTED FROM SUCH CERTIFICATION BY THE FEDERAL POWER COMMISSION OR AS TO WHICH SUCH ACTION IS PENDING OR PRODUCED OUTSIDE OF THIS STATE, OR SOLD, EXCHANGED, OR TRANSPORTED TO ANY OTHER STATE.

F. UNITED SHALL PAY ANY AND ALL EXPENSES INCURRED BY THIS COMMISSION IN CONDUCTING THE PROCEEDING INSTITUTED BY THIS ORDER, INCLUDING THE EXPENSES AND FEES OF ENGINEERS, CONSULTANTS, ACCOUNTANTS, SPECIAL COUNSEL, AND CLERICAL ASSISTANCE SPECIALLY EMPLOYED THEREFOR. THE COMMISSION WILL CERTIFY TO UNITED, ON A MONTHLY BASIS, THE EXPENSES THUS INCURRED.

G. ANY PARTY OBJECTING TO ANY PROVISION OF THIS ORDER SHALL FILE WRITTEN OBJECTIONS THERETO ON OR BEFORE OCTOBER 7, 1971.

H. ANY PARTY SEEKING TO INTERVENE IN THIS PROCEEDING SHALL FILE A PETITION TO INTERVENE ON OR BEFORE OCTOBER 7, 1971

BY ORDER OF THE COMMISSION:
BATON ROUGE, LOUISIANA
SEPTEMBER 28, 1971

John S. Hunt
CHAIRMAN

[signature]
COMMISSIONER

Ernest S. Tibeneux
COMMISSIONER

[signature]
ASST. SECRETARY

APPENDIX S

LOUISIANA PUBLIC SERVICE COMMISSION

SPECIAL ORDER NO. 17-71
(ORDER AFFIRMING JURISDICTION AND TO SHOW CAUSE)

At a session of the Louisiana Public Service Commission held at Baton Rouge, Louisiana on November 17, 1971, consideration was given to the deliberate and wilful refusal of United Gas Pipe Line Company (United) to either comply, or attempt to comply with the provisions of this Commission's Special Order No. 7-71 and of its General Order dated September 30, 1971.

IT APPEARING THAT:

United has filed a Plea to jurisdiction denying that it is a Louisiana intrastate pipe line company and also filed a Motion For Stay requesting that the proceedings instituted by our Special Order No. 7-71 be delayed pending the issuance of a decision by the Federal Power Commission (FPC) in Docket No. CP71-89.

United asserts that its unilateral action in applying to the FPC for certification of its separate intrastate pipeline facilities and operations in southern Louisiana invokes the supremacy clause of the United States Constitution to terminate the sole and exclusive jurisdiction this Commission has continuously and lawfully exercised. No authority has been cited in support of this conclusion.

The doctrine of pre-emption is applicable only where Congress has enacted legislation designed to encompass all aspects of a particular field of regulation. But, Congress has not delegated to the FPC the full reach of its constitutional powers over interstate commerce. On the contrary, it authorized that agency to regulate only certain limited aspects of the transportation and sale for resale in interstate commerce of natural gas. Congress gave the FPC no authority at all over intrastate commerce (FPC v. Transcontinental Gas Corporation, 365 U.S.1, 17). Furthermore, Congress enacted Section 1 (c) of the Natural Gas Act in order to reserve regulation of intrastate pipelines and of local distribution systems entirely to state regulation. Plainly then, the FPC must defer to the states on matters which are primarily of local concern.

The supremacy clause is inapplicable unless and until a binding and final determination has been made that United's separate pipeline system in southern Louisiana is both in interstate commerce and outside the scope of the Hinshaw Amendment.

Such a determination cannot be made by the FPC. Only the courts can exercise the judicial function of determining the lawfulness of an assertion of jurisdiction by that agency in a particular proceeding. State regulation by this Commission will end therefor, if at all, only after the Federal Courts have made an adverse decision which is no longer subject to judicial review.

This Commission believes that during the pendency of such litigation it has both the authority and the duty to continue its regulation of United's rates and services. Many of United's southern Louisiana customers have not acknowledged and some are in fact actively challenging and contesting FPC jurisdiction. If this Commission were to accept United's suggestion that it refrain from exercising, to the extent appropriate under the circumstances, its duly granted statutory powers during the pendency of FPC administrative and federal court review proceedings, the citizens of the state will be deprived of the benefit of having an expert and informed local body control and supervise United's intrastate rates and services.

United's claim that this Commission's investigation deprives the FPC of ". . . an opportunity to make an initial determination of its jurisdiction under the Natural Gas Act . . ." is wholly untenable. Such an investigation has been held and both this Commission and the State of Louisiana have participated as parties. This Commission believes that as the administrative arm of a sovereign state, it has the same right as the FPC to investigate all relevant facts and circumstances and make an independent determination of whether or not under state law United is operating a separate intrastate pipeline.

Indeed, a state public utility commission has the right to investigate the operations of, and compel production of data from, even a foreign corporation engaged exclusively in interstate commerce within the state. Natural Gas Pipe Line Company of America v. Slattery, 302 U. S. 300. Therefore, irrespective of the final outcome of the pending FPC proceedings, this Commission has the right to conduct its own investigation.

United's actions have already impaired, and will place in even greater future jeopardy, the availability of a reliable and adequate gas supply within the state. Its curtailment practices subject firm customers in this state to reduced deliveries while unfairly allowing its interstate pipeline customers, and both their firm and interruptible customers located in other states to receive uninterrupted and normal gas deliveries during summer and winter. These are surely matters of vital local concern and the pending investigation and data requests bear directly upon them.

United also contends that this Commission's prohibition against further commingling of interstate gas with intrastate gas and further interconnections between United's interstate and intrastate pipeline systems is a constitutionally prohibited burden on interstate commerce. This argument is also wholly lacking in merit. The prohibition does not restrain exportation of natural gas produced in Louisiana to other states, which might directly burden interstate commerce. It does no more than prevent United from unilaterally and unlawfully transforming its separate southern Louisiana intrastate pipeline into an integrated portion of its interstate pipeline system. This Commission believes that United, as the operator of a state regulated intrastate pipeline, should purchase a larger and fairer share of its gas requirements for this separate system from onshore Louisiana production.

It appears that United is dedicating an excessive and unreasonable share of gas produced within this state to its interstate customers. Every producing state and the operator of every intrastate pipeline has a right to use locally produced gas in intrastate commerce. This does not invade any federal prerogative since Congress has not delegated to the FPC comprehensive and plenary powers to allocate the total national supply of natural gas between intrastate and interstate markets. Furthermore, the Commission's prohibition is not absolute but merely requires that United shall obtain its prior permission and authorization. Until such consent has been sought, and unreasonably denied, United has no ground for complaint.

United contends that compilation of the requested information will be costly and burdensome. It claims that the total costs incurred will be $524,088, of which $470,006 is attributable to preparation of noncoincidental peak data for its sources of gas supply. Thus, submission of all other requested items would involve a claimed total cost of $54,082. The Commission finds that this is an insignificant sum in comparison with the regulatory expense incurred by United in FPC proceedings. The Commission also notes that United has apparently misconstrued its intent with respect to noncoincidental peak data.

United was afforded in Special Order No. 7-71 the opportunity to file timely objections by October 7, 1971 for the very purpose of avoiding such misunderstandings. Had such objections been made, they could have been dealt with at the informal prehearing conference scheduled for November 1, 1971.

The Commission is rescheduling this conference and is confident that if United will attend, many of its alleged difficulties will be resolved. To the extent that any information sought may not be available without disproportionate expense, the Commission will make appropriate modifications to its data request.

NOW, THEREFORE, IT IS ORDERED THAT:

A. This Commission hereby sets 10:00 a.m., November 29, 1971 as the appointed date for the convening of an informal prehearing conference to be held at the Commission's offices at the State Capitol Building, Baton Rouge, Louisiana. United,

Mr. R. U. Haslanger, President, and Mr. C. C. Barnett, Senior Vice-President, shall appear at such conference together with such attorneys, technical experts, documents and data as they may require and produce all of the detailed information and documents needed to fully comply with the various items requested in Appendix A of the Special Order and paragraph A of the General Order. To the extent that such items cannot be made available on that day, there shall be produced all documents and information concerning the time and costs of full compliance with each such item.

B. United, Mr. Haslanger, and Mr. Barnett shall produce at such conference the following documents which require only the automated and mechanical reproduction of documents already in existence:

i. Items 4, 6, and 7 of said Appendix A.

ii. Four copies of all certificate applications to the FPC (other than budget type applications) made by United from 1963-1971, inclusive.

iii. Four copies of the system flow diagrams filed by United with the FPC for the years 1966-1970, inclusive, under Section 260.8 of its Regulations under the Natural Gas Act.

C. Until February 15, 1972, United shall produce for and allow an inspection and copying of the books, papers and other records of United, and to the extent related thereto, those of its production affiliates, Pennzoil Producing Company, United Offshore Company, Pennzoil Pipe Line Company and Sea Robin Pipeline Company and of its parent Pennzoil United, Inc. by producing them on request of and at a convenient place satisfactory to the Commission, its Special Counsel, staff members or other representatives.

D. United shall show cause why it, Mr. Haslanger and Mr. Barnett should not be held in contempt of this Commission for failure to perform the acts required in paragraphs A - C of this Order, in paragraphs D and F of the Special Order and paragraph A of the General Order or for any violation of the prohibition of paragraph E of the Special Order and paragraph B of the General Order.

E. United's Plea To Jurisdiction and Motion For Stay are lacking in merit and the relief requested therein is denied.

BY ORDER OF THE COMMISSION:
BATON ROUGE, LOUISIANA
NOVEMBER 17, 1971

CHAIRMAN

COMMISSIONER

COMMISSIONER

SECRETARY

APPENDIX T

LOUISIANA PUBLIC SERVICE COMMISSION

SPECIAL ORDER NO. 27-71
(ORDER DENYING REQUEST FOR RELIEF
FROM OPERATING RESTRICTIONS)

At a session of the Louisiana Public Service Commission held at Baton Rouge, Louisiana, on November 29, 1971, consideration was given to the following facts:

This Commission adopted, on September 28, 1971, Special Order No. 1 which expressly prohibited United Gas Pipe Line Company (United) from further commingling interstate or offshore gas with intrastate gas and from making further interconnections between its separate intrastate system and its own or any other interstate system. The Commission's order also set for hearing the question of whether there was any need for an express prohibition against existing commingling and interconnections.

United was given the opportunity to file written objections to any provision of that order by October 7, 1971, but failed to do so. Subsequently, the Commission issued its Special Order No. 2 of November 17, 1971, which afforded United the opportunity to attend an informal conference on November 29, 1971 and show cause why it should not be required to comply with each of the provisions of said prior orders. United appeared at this conference and filed a "Statement and Request for Relief From Operating Restrictions" which asked the Commission to relieve it entirely from the prohibition against further commingling and interconnections. United will comply with all other provisions of said Orders, unless this Commission relieves it of such obligations.

This prohibition was designed to preserve the status quo during the pendency of litigation before the Federal Power Commission (FPC) and this Commission concerning the question of jurisdiction over United's separate intrastate Louisiana pipeline systems. It is necessary because certain parties in the FPC proceeding claim that that agency would acquire jurisdiction as a result of commingling or interconnections deliberately made by United for the purpose of rearranging its system in order to escape the jurisdiction of this Commission and converting its intrastate system to an interstate pipeline. The FPC has not yet rejected these contentions and may adopt this view.

During the informal conference of November 29, 1971, United advised this Commission that it would not make any new interconnections or change the pattern of commingling. United also advised the Commission that if abnormal weather conditions occur, it might be necessary for the purpose of meeting emergency needs to use greater volumes of interstate and offshore gas during the peak day for the current winter season than were used during the preceding winter season. United erroneously construes this Commission's order as prohibiting any increase in such peak day gas volumes. This Commission advised United that it had misconstrued the scope of the prohibition and requested it to enter into a stipulation that it would not take advantage of such emergency situations, by arguing that such emergency integration gave rise to federal jurisdiction in what would otherwise have been a separate intrastate system subject solely to state regulation. Such stipulations are conventional in litigation where parties

wish to preserve the status quo respecting their legal rights and duties and at the same time avoid unwarranted and unnecessary injury to innocent third parties. Here, vital public interests are involved which United has an affirmative duty to protect.

IT APPEARING THAT:

United's refusal to enter into such a stipulation is totally unjustifiable and unreasonable. Indeed, its refusal raises serious questions as to the sincerity of its conduct and motives.

United is absolutely mistaken in assuming that jurisdiction can be based upon a temporary emergency situation caused by nonrecurring cold weather conditions or by a gas shortage of unpredictable duration on its system. We will determine the question of whether United's pipeline system is a separate intrastate pipeline or an integral portion of its interstate pipeline system on the basis of objective facts and genuine operational necessities. No credence or weight will be given to self-serving and unilateral changes in operating modes or gas supply patterns which are wholly within the control of United and which may be artificially manipulated by it in order to advance its cause in the pending litigation before the FPC and this Commission. This Commission wishes to express its trust that the FPC will also disdain any reliance upon United's efforts to deliberately create an artificial and exaggerated gas shortage in its Southern Louisiana system for the purpose of showing a spurious integration.

United is seeking to wrongfully and unlawfully arrogate unto itself the basic decision of jurisdiction. A regulated public utility cannot thus usurp the functions and powers conferred upon either this Commission or the FPC.

The FPC has found that there is an emergency shortage of gas supplies and has authorized interstate pipelines to purchase gas from intrastate sources, such as producers and pipelines. It has specifically exempted intrastate gas companies engaged in such emergency gas supply arrangements from its jurisdiction. This Commission also finds that there is an emergency situation with respect to the shortage of gas supply and that this situation has been aggravated by United's improper refusal to use a fair share of locally produced gas for its separate intrastate system.

This Commission finds, as the FPC has also found, that jurisdiction cannot be based upon transitory and nonrecurring emergency situations. Accordingly, any increase in the volume of interstate and offshore gas used to meet emergency peak day needs will not be given any weight in determining United's status as an intrastate pipeline.

We will require United within ten days after each such purchase or other arrangement for the use of additional quantities of interstate or offshore gas to file a report setting forth the details of each such transaction. These reports will be carefully evaluated and reviewed to ensure that United does not take advantage of these emergency conditions as a

pretext to advance and strengthen its claim that the FPC has acquired jurisdiction over the separate intrastate pipeline which has been always regulated solely and exclusively by this Commission.

United seeks to be relieved entirely of the prohibition against further commingling and interconnections although the emergency situation which it relies upon affects only the operation of this prohibition with respect to peak day volumes as to which there is no problem. Accordingly, United's request is unnecessary and unwarranted.

We note that the FPC has authorized intrastate producers to sell spot gas for emergency use to interstate pipelines. The owner and operator of an intrastate gas pipeline has both the right and the duty to purchase such intrastate gas to meet peak day needs and other emergency gas shortage situations. We do not believe it equitable that the FPC should authorize interstate pipelines to purchase intrastate gas while asserting that the use of interstate gas by an intrastate pipeline will cause [redacted] state regulatory body to lose its jurisdiction. Certainly, considerations of comity and fairness would appear to require a contrary result. Accordingly, the Commission will direct United to use intrastate gas to the maximum extent available for the purpose of meeting peak day and other emergency needs.

NOW, THEREFORE, IT IS ORDERED THAT:

A. The relief requested by United's Statement and Request for Relief from Operating Restrictions is unnecessary, as well as unwarranted, and is hereby denied.

B. Before increasing the volumes of interstate or offshore gas used in the 1970-1971 winter season, United shall purchase intrastate spot gas to meet emergency peak days needs and other emergency gas shortage situations.

C. Where the use of interstate or offshore gas is necessary in order to avoid or minimize serious curtailment of service occasioned by abnormally cold weather conditions or unusual or unexpected demand, and where such arrangements are limited to a single period of not more than 60 days:

(i) United may increase the 1970-1971 winter season peak day quantities of interstate or offshore gas flowing through existing interconnections and resulting from existing patterns of commingling which were in effect on September 28, 1971.

(ii) United shall, however, in each such instance so advise the Commission immediately by telegram or letter stating briefly the circumstances and shall within ten (10) days after each such transaction file a statement in writing and under oath, together with four conformed copies thereof, setting forth the purpose and character of the increased interstate volumes, the purchase or exchange and transportation of the gas volumes involved, the price being paid, the facts warranting invocation

of the emergency authority granted in this paragraph, and the anticipated period of the stated emergency. This Commission will review and evaluate each such report in order to insure that United does not take advantage of alleged emergency conditions as a pretext to artificially manipulate and rearrange its system and gas flows thereunder for the purpose of lending substance to its claim that its intrastate systems are an integral part of its interstate pipelines.

BY ORDER OF THE COMMISSION:
BATON ROUGE, LOUISIANA
NOVEMBER 29, 1971

/s/ John S. Hunt
CHAIRMAN

/s/ Ernest S. Clements
COMMISSIONER

/s/ Nat B. Knight, Jr.
COMMISSIONER

/s/ Marshall B. Brinkley
ASSISTANT SECRETARY

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Nos. 71-1016 and 71-1040

In the Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION,
Petitioner

v.

LOUISIANA POWER & LIGHT CO., ET AL.

UNITED GAS PIPE LINE CO. and PENNZOIL UNITED, INC.,
Petitioners

v.

LOUISIANA POWER & LIGHT CO., ET AL.

On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

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Nos. 71-1016 and 71-1040

In the Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION,
Petitioner

v.

LOUISIANA POWER & LIGHT CO., ET AL.

UNITED GAS PIPE LINE CO. and PENNZOIL UNITED, INC.,
Petitioners

v.

LOUISIANA POWER & LIGHT CO., ET AL.

On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR UNITED AND PENNZOIL

ARGUMENT

I. Introduction

The critical shortage of natural gas cannot be seriously contested. The shortage has been judicially acknowledged by both the court of appeals, *Austral Oil Co.* v. *Federal Power Comm'n*, 428 F.2d 407 (5th Cir.), *cert. denied*, 400 U.S. 950 (1970), and the district court (A. 260; R. 427-28); each day brings increasing public

awareness of its dimensions. This past week the federal government's principal energy spokesmen testified that the shortage of natural gas is severe and that anticipated demand for gas cannot be met from domestic sources in the foreseeable future.[1]

A. The Underlying Issue Is Who Will Determine Priorities To A Finite Gas Supply.

It is undisputed that the total gas requirements of all of United's customers cannot be met. The electrical utilities, the other industrial customers, the gas distributors each assert in this Court a different theory by which they and their customers should have priority. The inconsistent nature of these positions and the problems they pose for United are apparent. If the Federal Power Commission (FPC) lacks jurisdiction to allocate scarce supplies in times of shortage, the priorities will be based on who has the physical capacity, by virtue of geographical location near United's gas sources, to take his gas first and on who is able first to get an injunction against United's curtailment program. The gas obtained by this means would necessarily be taken from other customers of United.

Thus, LPL's suggestion that this case is simply a private contractual dispute between it and United has a hollow ring. LPL—and those who join it in this argument—are in fact urging unregulated chaos. As a practical matter, systemwide curtailment priorities

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[1] Testimony before the House Committee on Interior and Insular Affairs, April 10 and 11, 1972, of Honorable Rogers C. B. Morton, Secretary of the Interior; Honorable John N. Irwin, II, Under Secretary of State; Honorable George A. Lincoln, Director, Office of Emergency Preparedness; Honorable Barry J. Shillito, Assistant Secretary of Defense for Installations and Logistics; and Dr. Edward E. David, Jr., Science Advisor to the President.

cannot be uniformly established by private litigation between United and individual customers and, in view of the fact that gas from United's system serves most of the eastern portion of the United States, such priorities are beyond the control of any state regulatory body.

B. LPL and Others Argue a Number of Disputed Issues Which Are Irrelevant to the Questions Before This Court.

It is regrettable that LPL and others devote substantial portions of their briefs to malicious, inaccurate and wholly irrelevant accusations of wrongdoing on the part of United. These unsupported charges of a grand conspiracy (euphemistically characterized as "a designed program") not only ignore the legal questions before this Court, but appear to be based on the assumption that this Court's decision of the legal questions could be influenced by a blatant appeal to emotion and prejudice. While United will not be led into a lengthy discussion of allegations and issues which are not before this Court, some comment as to the accuracy of these charges is in order.

LPL has the audacity to assert that United and the FPC have joined in a "conspiracy" to permit curtailments for the purpose of increasing United's revenues. Essential to this purported scheme is the assertion that United merely created the illusion of a natural gas shortage.[2] The short answer is that the need to curtail

[2] This is indeed a grand illusion since it requires for its effectiveness the active participation of all gas producers, the pipelines, the distributors and their customers, the news media, and every element of the federal government with energy policy responsibilities. All of the foregoing have verified the existence and critical nature of the natural gas shortage.

deliveries has been a financial catastrophe for United and will continue to be until service has been fully restored.[3] Indeed, the suggestion of a United-FPC conspiracy is ludicrous on its face at a time when six other gas pipelines are also curtailing service and when 26 pipelines have filed curtailment programs—all pursuant to the same FPC order and procedures.

The issue presented to this Court is *not* the origin of United's gas shortage or, as Monsanto and Texas Gulf have argued, whether United's systemwide shortage was "self induced' by improvident additions of service. First, the service in question was certificated by the FPC. Moreover, this charge was directly rebutted by United in the FPC curtailment proceeding and this issue was specifically remanded to the FPC examiner for consideration in making the determination as to the reasonableness and proper implementation of the United curtailment plans.[4] The effort to reargue before this Court a disputed portion of the curtailment proceeding is wholly irrelevant to the question of FPC curtailment jurisdiction.

The issue is also *not* whether United has legal obligations to any of its various customers as a result of curtailments. LPL's action in the district court was a suit to enjoin United's curtailments, not a suit for damages. Thus, the only question presented to this Court with respect to curtailments is the FPC's juris-

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[3] United's 1970 and 1971 FPC Form 11 reports show that total gas sales in 1971 declined from 1970 by 7.17 percent. The same reports show United's net income falling from $19,685,835 in 1970 to $7,669,510 in 1971. The decline in sales and profits is accelerating in 1972.

[4] *United Gas Pipe Line Co.*, FPC Opinion No. 606-A, (Mimeo at 4, December 3, 1971).

diction to allocate limited supplies of gas among all of United's customers.

LPL also seeks to mislead this Court as to the impact of United's curtailments on LPL's human needs consumers. It falsely argues (LPL Br. 35) that the gas it is not receiving under the curtailment program is needed to cool homes and for other domestic purposes. In fact, it is undisputed that United's curtailment of gas deliveries to LPL and other electric utilities affects **only** deliveries for the generation of electricity for industrial use and in no way reduces gas available to generate electricity for domestic use.

LPL's argument that United deliberately introduced small amounts of interstate gas into a previously local system for the purpose of escaping improvident industrial contracts is contrary to the facts. The record in the certificate case, FPC Docket No. CP71-89, makes clear that on the 1971-72 peak day over 58 percent of the gas flowing in United's Green System was interstate gas. (Echteroff Test. 10-11; A. 154, 159; R. 252, 264); this gas has been used because United has been unable to supply that system solely with local gas.[6]

Moreover, testimony filed by United on March 27, 1972 in the certificate case reveals that the great bulk of the facilities in the Green System were certificated by the FPC many years ago, and that these certificates

[6] LPL attempts to escape the undisputed evidence that local reserves are simply not adequate to meet the peak-day demands in the Green System by arguing (LPL Br. 42) that the Pennzoil Producing Company gas production from the Lirette and Bay Baptiste fields was sufficient, at least during 1970, to meet the net annual deficiency in the Green System. This overlooks the fact that gas is not delivered on a net annual flow basis; it is delivered on a daily basis. The certificate record makes clear that the peak-day deficiency in the Green System cannot be met by daily deliveries from Pennzoil Producing reserves.

have never been terminated or abandoned. Since 1954, as a result of FPC approval of a settlement agreement and stipulation in one of United's rate cases, sales for resale from these facilities have been treated as not being subject to FPC rate jurisdiction. Thus, during th past thirty years the jurisdictional status of this portion of United's system has varied, depending upon changes in supply and demand patterns.[7]

All of these sweeping and unsupported charges concerning the curtailment and certificate cases have a single goal: to obscure the fundamental jurisdictional questions to be decided by this Court.

II. LPL And Its Supporters Misread The Natural Gas Act, Its Legislative History, And This Court's Decisions With Respect To The FPC's Curtailment Authority.

No one disputes that the FPC cannot regulate direct sale *rates*. Thus, LPL's argument based on the language of the Natural Gas Act (the Act), the legislative history to that effect and the cases which support that construction of the Act is a straw-man. For the fact that the FPC cannot regulate direct sale *rates* in no way diminishes the ability of the FPC to deal with curtailments under the transportation authority granted in Section 1(b) by regulating the volumes of interstate gas transported to all customers of a jurisdictional pipeline.

Nor is LPL helped by the quotation from *Federal Power Commission* v. *Transcontinental Gas Pipe Line*

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[7] The Fifth Circuit did not, of course, have this history before it when it reached its decision. This illustrates the danger of a premature judicial decision resulting from a collateral attack on a pending agency proceeding and made on the basis of an incomplete record.

Corp., 365 U.S. 1 (1961) (*Transco*). The fact that the FPC has the power to completely veto a direct sale at the certificate stage is in no way inconsistent with its subsequent exercise of transportation authority to allocate scarce supplies in time of shortage. Indeed, in *Transco*, 365 U.S. 1, 28, this Court quoted from and reaffirmed its statement in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U.S. 507 (1947) that:

> "... [T]he matter of interrupting service is one largely related ... to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accomodation of any conflicting interests among various states." 332 U.S. 507, 523.

This Court's reaffirmation in *Transco* of its 1947 *Panhandle* description of the FPC's curtailment authority effectively disposes of LPL's contention that this statement was dictum. For in *Transco*, 365 U.S. 1, 27, this Court noted that its articulation of FPC authority to control the interruption of service was made in direct response to Panhandle's argument that the states could not control direct sales rates because of the possibility that they could not deal effectively with curtailments.

It is argued by some that, although the FPC has curtailment jurisdiction, such authority can be exercised only after the completion of a Section 7(b) abandonment proceeding. This argument ignores the fact that shortages create emergencies requiring immediate allocation of limited supplies among all customers in a manner consistent with the public interest. To say that no curtailments of firm service can take place until the completion of lengthy hearings and the issuance of an FPC abandonment order is to ignore the reality that

when there is insufficient gas to meet the demands of all customers some customers *will* be curtailed during the pendency of the proceedings.

Thus, to adopt the argument that the FPC is impotent to allocate limited supplies during the pendency of a hearing as to proper priorities of service would entirely defeat the effective exercise of its curtailment jurisdiction. The interests of a pipeline's other customers would be subordinated to those of its direct industrial customers since the industrials, by virtue of their superior location on the pipeline system, could take whatever gas they need, leaving only the residue available to supply human needs consumption. Moreover, a pipeline's industrial customers would be free to impose a curtailment plan favorable to them by collateral suits at the very time, under this theory, that the FPC's hands are tied by the pendency of the curtailment proceeding.

This does not mean, however, that the implementation of curtailment plans by the filing of tariff sheets under Sections 4 and 5 deprives customers of their procedural safeguards or gives pipelines the freedom to unilaterally impose a curtailment program of their choice. On the contrary, the FPC has already modified United's curtailment plan in several respects. Comprehensive hearings have been held on the fairness of the curtailment priorities. The FPC will ultimately issue an order on the reasonableness and proper implementation of the plan — a finding that will govern future curtailment priorities and will affect United's responsibilities to its customers for past curtailments. In all respects, this is a more realistic and equitable procedure for the exercise of curtailment jurisdiction than the alternative suggested — an establishment of prior-

ities by industrial customers on a self-help or injunction basis.

Those who contest this exercise of FPC jurisdiction fail to point out that if the FPC is not permitted to enforce interim implementation of curtailment plans there will be no regulation at all. Thus, it misses the point to argue that FPC reliance on the inability of individual courts or state agencies to effectively regulate curtailments is an argument that "need" alone can provide statutory authority. Rather, the inability to regulate by other means demonstrates, consistent with *Transco, supra,* that Congress must have intended federal regulation of this problem so as to avoid a regulatory gap.

In short, Section 1(b) of the Act contains a separate, independent grant of transportation authority which the FPC has properly exercised in curtailment situations by utilization of Sections 4 and 5 of the Act.

III. LPL And The Producers Have Not Justified Failure To Exhaust Administrative Remedies In The Certificate Proceeding.

The exhaustion arguments raised by LPL and others are quickly dispatched. LPL and Texaco both argue that the FPC is free to continue to conduct the certificate proceeding and that they have in no way sought to interfere with the conduct of that proceeding. Specifically, Texaco points out that no injunction against the FPC has been sought and that, consequently, United's exhaustion authorities[8] are inapplicable. This is

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[8] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962) and *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, *rev'g. mem.* 156 F.2d 821 (D.C. Cir. 1946).

simply not true. The court of appeals decision, if upheld, would remove the Green System from FPC jurisdiction just as effectively as if LPL had obtained an injunction prohibiting the FPC from exercising regulatory authority over the Green System.

Nor can United's exhaustion authorities be distinguished by LPL and others on that ground that, in their view, no arguable basis for FPC jurisdiction exists in this case but that agency jurisdiction was relatively clear in the exhaustion cases. The FPC is attempting to conduct a Section 7 certificate proceeding with respect to United's facilities in its Victoria and New Orleans Divisions. If anything is undisputed on this record it is that the FPC has authority, upon application of a jurisdictional pipeline, to conduct such a proceeding.

LPL's argument (LPL Br. 44-45) that it is not required to exhaust because the FPC cannot grant injunctive relief is patently without merit. A party may not escape application of the exhaustion doctrine simply because the full range of remedies which might be available in a judicial proceeding are not available at the agency. Moreover, LPL has a remedy at the FPC. If it thinks that it is entitled to more gas than it is presently getting under United's curtailment program, it may request the Commission to order United to give it more gas. The FPC has repeatedly expressed a willingness to entertain such applications[9] and in fact has granted in part such an application by

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[9] *United Gas Pipe Line Co.*, FPC Opinion No. 606 (Mimeo at 14, Oct. 5, 1971); *United Gas Pipe Line Co.*, FPC Docket Nos. RP71-29, RP71-120 (Order of July 2, 1971); *Northern Natural Gas Co.*, FPC Docket No. RP71-89 (Order of March 19, 1971).

Texas Gulf, one of the *amicus* participants in this case.[10]

The argument based on *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949) and *Grubb* v. *Public Utilities Comm'n*, 281 U.S. 470 (1930), amounts to a contention that United and the FPC are bound in this Court under principles of *res judicata* by the judgment of the court of appeals now under review. This position is patently absurd.

The additional cases relied on by LPL (LPL Br. 43-46) provide no insulation from the exhaustion doctrine. *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946), and *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), both involve situations in which a judicial remedy for protection of federal due process or equal protection rights was provided by statute as supplementary to or independent of an administrative remedy. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557 (1919), and *Leedom* v. *Kyne*, 358 U.S. 184 (1958), both involve *reviewability* problems that arose after an agency order had been issued. None of these cases authorize a collateral attack during the pendency of agency proceedings.

LPL's argument based on *City Bank Farmers Trust Co.* v. *Schnader*, 291 U.S. 24 (1934), that exhaustion is not required when there is relative certainty of an adverse agency decision is unimpressive. Reduced to its simplest terms, the argument would authorize a resort to the courts every time a party to an agency proceeding concluded that his position was unmeritorious. In view of this Court's requirement of exhaus-

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[10] *United Gas Pipe Line Co.*, FPC Docket Nos. RP71-29, RP71-120 (Order of January 28, 1972).

tion in *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U.S. 159 (1929), when it was relatively clear that the party being required to exhaust would not prevail before the agency and in light of the subsequent decision of this Court, *e.g., Myers, supra,* requiring exhaustion under similar circumstances, the holding in *Schnader* is of doubtful validity, 3 Davis, *Administrative Law* § 20.07, at 99-100 (1958).

The attempts of Texaco (Texaco Br. 20) and Humble (Humble Br. 42-43) to distinguish the authorities requiring review of agency jurisdictional determinations by the Section 19(b) review procedures (United Br. 22-24) do not stand analysis. Humble concedes (Humble Br. 43, n. 28) that the authorities cited by United in its opening brief hold that Section 19(b) review procedures provide the exclusive method for review of FPC orders and that a party to the certificate proceeding could not review FPC Opinion 610 in a collateral suit. However, they argue that these authorities are inapplicable when the collateral suit is filed prior to the entry of an order by the FPC. The adoption of this argument would be wholly inconsistent with the concern expressed by this Court in *McKart* v. *United States,* 395 U.S. 185, 195 (1969), that frequent and deliberate flouting of administrative processes not be permitted to weaken the effectiveness of an agency by encouraging people to ignore its procedures. Clearly, nothing could more encourage the ignoring of FPC proceedings than the adoption of a principle that the earlier one gets to the courthouse the less chance he faces of being required to exhaust his administrative remedies.

CONCLUSION

The responsive briefs wholly fail to diminish the force of the authorities presented in petitioners' briefs supporting FPC curtailment jurisdiction under the Natural Gas Act and requiring reversal of the court of appeals decision on the certificate issue for failure to exhaust administrative remedies. Accordingly, the judgment of the court of appeals should be reversed, and that of the district court affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1016

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v.

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No. 71-1040

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Respondents.

ERRATA NOTICE TO BRIEF AMICI CURIAE OF ATLANTA GAS LIGHT COMPANY, ALABAMA GAS CORPORATION, GEORGIA POWER COMPANY, SAVANNAH ELECTRIC AND POWER COMPANY, AND GEORGIA PUBLIC SERVICE COMMISSION

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Atlanta Gas Light Company, Alabama Gas Corporation, Georgia Power Company, Savannah Electric and Power Company and Georgia Public Service Commission (Southern Consumers) respectfully request that the following changes be made to their Brief *Amici Curiae* to correct errata.

Page	Change
(ii)	Line 4, after "Contracts or" insert "Prior Commission Certificate"
(ii)	Under "III," second line thereof, change "Circumstanees" to "Circumstances"
(v)	Under "STATUTES," Section 7, 15. U.S.C. §717f, after "9, 10, 12, 13, 18," insert "19, 20, 22, 24".
8	Line 25, change "any" to "an"
8	Line 26, change "and" to "in"
9	Line 20, change "pendancy" to "pendency"
9	Lines 24 and 25, change "The Commission claims that its" to "The Commission's claim that it has"
24	Line 8, change "modification to the pipelines" to "modification of a pipeline's"
24	Line 15, change "hald" to "held"
25	Line 25, change "priorties" to "priorities"
29	Line 11, change "the" to "a"
30	Line 3, change "in" to "of"
33	Line 23, change "proscribed" to "prescribed"
34	Line 2, change "curtial" to "curtail"

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v.

LOUISIANA POWER & LIGHT COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

I

THE GAS SUPPLY SITUATION

The fact that this nation is presently in a natural gas supply crisis has been judicially recognized by

several courts,[1] including both the district court (Pet. App. 35a)[2] and the court of appeals (Pet. App. 1a) in this case. Nevertheless, LP&L asserts that gas is available and that the shortage is "contrived" (LP&L Br. 14, 36–38). While our main brief refers to the acuteness of the current shortage, some additional facts should be noted in view of LP&L's challenge.

Not only are there twenty-six curtailment proceedings currently pending before the Federal Power Commission, but, as of February 1972, twenty-two state regulatory agencies have taken action to limit retail sales of natural gas, and eight additional state agencies were conducting proceedings relative to the gas shortage.[3]

As evidence of a contrived gas shortage, LP&L cites notices in the Federal Register of applications to make emergency purchases of gas by United and the Transcontinental Gas Pipe Line Corporation ("Transco")

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[1] *Southern Louisiana Area Rate Cases (Austral Oil Co. v. Federal Power Commission et al.)*, 428 F.2d 407, 443 (C.A. 5), certiorari denied *sub nom. Municipal Distributors Group v. Federal Power Commission*, 400 U.S. 950; *City of Chicago, Illinois, et al. v. Federal Power Commission*, No. 23,749, decided December 2, 1971, Slip op. pp. 28–29, 32, certiorari denied, April 17, 1972 (No. 71-979).

[2] "Pet. App." references are to the appendices to the petitions in No. 71-1016. "United . . . App." references are to the appendices to the petitions in No. 71-1040.

[3] National Association of Regulatory Utility Commissioners Subcommittee of Staff Experts to Gas Committee, "Survey of Action by State and Federal Regulatory Agencies and Intrastate Natural Gas Distributors to Meet Natural Gas Shortages", February 29, 1972, Attachment 1.

(LP&L Br. 26). Actually, fourteen pipelines have made emergency purchases of gas to mitigate the shortage, but, even so, seven interstate pipeline companies were unable to meet contract requirements and were compelled to curtail, including Transco and United.

LP&L has also cited the annual reports of three distribution companies to support its assertion that no shortage exists (LP&L Br. 36–37). Adequate service to two of the three companies,* which serve human needs customers, is being maintained as a result of curtailment programs presently in effect pursuant to Commission order and other Commission action, such as allowing emergency purchases by interstate pipelines. See Commission Orders Nos. 402, 402-A and 431, 36 Fed. Reg. 7511, 8027; 36 Fed. Reg. 7705; see also 18 C.F.R. 157.22.

II

THE LEGISLATIVE HISTORY

LP&L argues (LP&L Br. 30–33) that Congress did not intend in Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), to give the Commission authority over curtailments of deliveries of natural gas to the

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*One distribution company cited by LP&L, Public Service Company of Colorado, purchases its gas from Colorado Interstate Gas Company, and is not dependent either directly or indirectly upon United.

On April 7, 1971, after LP&L's complaint in this case was filed, LP&L filed a registration statement with the Securities and Exchange Commission, stating that after June 1971, LP&L expects to be able to offset any foreseeable gas curtailment by burning oil. (App. 193).

direct industrial customers of an interstate pipeline. Great emphasis is placed on the portion of Section 1(b) that provides that, while the Act applies to the transportation of natural gas in interstate commerce, to sales of interstate gas for resale and to natural gas companies, it does not apply to "any other transportation or sale of natural gas." Reference to the legislative history of Section 1(b) shows that, with respect to direct industrial sales, the quoted provision was intended solely to exclude Commission jurisdiction over rates.

As originally introduced in the House of Representatives, Section 1(b) contained a proviso expressly excluding Commission jurisdiction over the "rates * * * for * * * the sale of natural gas for industrial use only." H.R. 4008, 75th Cong., 1st Sess. This original bill was amended and renumbered in committee to contain the language ultimately adopted excluding application of the Act to "any other * * * sale." See

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* LP&L asserts (LP&L Br. 35) that the Louisiana regulatory commission "* * * will have a better knowledge of the 'public interest' in Louisiana in terms of gas usage" than the Federal Power Commission, arguing that "[t]here can be no doubt that the Louisiana Commission, made up of elected officials, will be more responsive to the needs of Louisiana citizens in allocating the use of gas." But the citizens of the numerous other States throughout the country who are dependent for their gas on the access of United and other interstate pipelines to natural gas produced from Louisiana gas fields, are entitled to equal consideration. Clearly, these citizens would be adversely affected by rulings of the Louisiana commission (rulings which may be beyond that agency's constitutional authority; see pp. 25-26 of our main brief) allocating gas produced in Louisiana but committed to interstate commerce.

H.R. 6586, 75th Cong., 1st Sess., pp. 3–4. The committee report which accompanied the revised bill reveals that the new language was intended merely to restate the proviso in H.R. 4008 concerning the fixing of rates.[6] Commenting on Section 1(b), the report stated (H. Rep. No. 709, 75th Cong., 1st Sess., p. 3):

> * * * It will be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows:
>
> "but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the production or gathering of natural gas."
>
> The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill.

[6] The revision to Section 1(b) made by the committee was proposed by the General Solicitor of the National Association of Railroad and Utilities Commissioners who supported the bill. He testified that direct industrial sales should be exempt from Commission jurisdiction to permit State commissions, which set rates for distribution company customers, to set the rates for direct industrial customers as well, to prevent unjustifiable discrimination at the retail level. Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 4008, 75th Cong., 1st Sess., p. 148. There thus can be little doubt that the purpose of the limiting language in Section 1(b) was to deprive the Commission of jurisdiction over the rates at which direct industrial sales are made.

The Senate committee report on this point was identical. See S. Rep. No. 1162, 75th Cong., 1st Sess., p. 3.

Thus, the exclusion of retail sales—whether by pipelines to direct industrial consumers or by distribution companies—from Commission jurisdiction does not negate with respect to non-rate matters the Commission's independent jurisdiction over the transportation of natural gas in interstate commerce. And, as we pointed out in our main brief, pp. 24–25, this court has squarely recognized that "the matter of interrupting service is one largely related * * * to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states." *Panhandle Eastern Pipe Line* v. *Public Service Commission of Indiana*, 332 U.S. 507, 523; see also *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 27–28.[2]

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[2] LP&L's claim (LP&L Br. 33–34) that former Commission Chairman Swidler's testimony in connection with proposed legislation contradicts this construction of the Natural Gas Act is not accurate. Reference to the proposed legislation reveals that the Commission sought rate jurisdiction over direct industrial sales. And the reference to the Commission's 1970 Annual Report is also misread. The report refers to legislation to require emergency interconnections and curtailments and allocations by any gas company whether or not subject to the Commission's jurisdiction, a provision which would reach distribution companies and intrastate pipeline companies, if adopted by Congress. In any event, proposals of an administrative agency to clarify or confirm its jurisdiction over a particular subject matter should not be construed as evidence that such jurisdiction does not already exist. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 169–171; *Helvering* v. *Clifford*, 309 U.S. 331.

III

JURISDICTION OVER DIRECT SALES IS NOT LIMITED TO SECTION 7 OF THE NATURAL GAS ACT

a. The court of appeals (Pet. App. 16a) acknowledged that the Commission has some jurisdiction over direct sales pursuant to the transportation authority, but sought to limit the Commission's power to exercise such jurisdiction to Section 7 of the Natural Gas Act, 15 U.S.C. 717f (see p. 18 of our main brief). The effect of this position, if upheld, would be to sustain LP&L's claim (if supportable as a matter of contract law) that it has a preferential contract right, superior to the rights of domestic and other consumers, to the delivery of gas (LP&L Br. 4, 9, n. 6)—a right which the Commission would be powerless to affect under Sections 4, 5 and 16 of the Natural Gas Act, 15 U.S.C. 717c, d and o.[8]

As we have noted (main brief, pp. 33–34), Sections 7(c), 4(b) and 5(a) are similarly worded, and there is no basis for finding that the Commission's transportation authority applicable under Section 7 to direct sales is not similarly applicable under Sections 4 and 5 to direct sales. Moreover, Section 4(b) by its own terms applies to service and prevents a natural gas company from discriminating in service to "any

[8] LP&L appears to concede that Sections 4, 5 and 16 would be applicable to curtailments of gas deliveries to direct industrial customers, if such curtailments are in fact covered by Section 1(b) of the Act (LP&L Br. 23, n. 10). The briefs of some of the *amici* dispute this proposition.

person".[7] With respect to Section 5(a), this Court has expressly held in a pipeline rate case that, while the Commission lacks authority to fix rates for direct industrial sales, it may take direct sales rates into consideration in fixing rates for interstate wholesale sales. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635. The Court found it clear that contracts covering direct industrial sales come within the portion of Section 5(a) which reads "or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential." 324 U.S. at 647.

If Sections 4, 5 and 16 do not apply to curtailments of deliveries of natural gas to direct industrial customers, interstate pipelines would be free to grant preferences to or discriminate in favor of direct industrial customers with respect to natural gas service. And, as LP&L correctly puts it, all direct customers would be immune from Commission curtailment proceedings (LP&L Br. 14–15). Our views of the Commission's broad powers under Sections 4, 5 and 16 over curtailments of deliveries of interstate natural gas to *all* customers of a pipeline, whether direct or wholesale, are set forth at pages 26–34 of our main brief.

b. In support of its claim that direct industrial cus-

[7] The Third Circuit has held that the Commission is empowered under Section 4(b) to allocate natural gas among a pipeline's direct industrial and distribution company customers. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. 2d 467, 472–473 (C.A. 3), certiorari denied, 352 U.S. 891.

tomers are immune from federal curtailment jurisdiction, LP&L relys upon *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp., supra,* wherein this Court upheld the Commission's authority to consider end use, as well as price factors, in determining whether initially to certificate a sale under Section 7(c) of the Natural Gas Act (see pp. 24–25 of our main brief). LP&L argues (LP&L Br. 29–31) that in holding that the Commission has a "veto power" over direct sales in initial certification proceedings under Section 7(c) (365 U.S. at 17) and in recognizing that the Commission does not have "complete allocation" power (365 U.S. at 19), the Court impliedly ruled that the Commission has no curtailment jurisdiction over direct sales other than under Section 7.

In our view, there is no basis for LP&L's argument. First, the reference to the Commission's "veto power" reflected the fact that in proceedings under Section 7(c), the Commission may veto proposed direct sales, but may not set the rates. This case, however, involves neither initial certification proceedings under Section 7(c) nor the setting of rates for direct sales.[10] Instead, it concerns proceedings invoking the Commission's authority under Sections 1, 4, 5 and 16

[10] In Opinion No. 696, the Commission rejected a proposal by United that would have given lowest curtailment priority to power plant and industrial customers that pay noncompensatory rates. In doing so, the Commission noted that "there is little correlation between the need to curtail deliveries because of inadequate gas reserves and the degree of compensation received for the sale of the limited gas supplies which are available" (Pet. App. 68a).

of the Act to allocate *service* in order to protect the consuming public during a gas shortage. In short, the Court did not state, as LP&L asserts, that the Commission had only "veto power" jurisdiction over direct transactions; it held that, *in a Section 7(c) proceeding for initial certification*, the Commission's authority was limited to a "veto power."

Finally, this Court's statement in *Transcontinental Gas* that the Commission lacks "complete allocation power", when placed in proper context, does not cast doubt on the Commission's jurisdiction over curtailments. In making the statement, the Court was referring to the Commission's admission that it did not have complete power over conservation of total gas reserves because many reserves were committed to purely *intrastate* gas companies. We are not concerned here, however, with an intrastate supply of gas; we are concerned with an interstate supply.

IV

THE GREEN SYSTEM

With respect to the certificate proceeding, we adhere to our view (main brief, pp. 35–38) that the only issue before this Court is whether the Commission should have been given the opportunity to determine its jurisdiction over the "Green System" in the first instance.[11] In addition to the factors mentioned at

[11] In Commission Opinion No. 610 in Docket No. CP71–89 (United Pet. App. 91a), decided after the decision below in this case, the Commission determined that it had jurisdiction over the "Green System." The opinion is currently pending on appeal before the Fifth Circuit *sub nom. Humble Oil & Refining Co.* v. *Federal Power Commission*, No. 72–1720.

pages 35–38 of our main brief, we point out that the merits of the jurisdictional issue were never before the district court, and were improperly ruled upon by the court of appeals. The documentary evidence in the certificate proceeding before the Commission (Docket No. CP71-89) was introduced in the district court for the limited purpose of showing the status, scope, and extent of the Commission proceedings (App. 138, 182). The Commission specifically pointed out that the evidence was not presented to establish the truth of the representations contained therein (App. 182) and LP&L's counsel agreed to the admission of the evidence for that purpose only (App. 239). In view of the fact, however, that LP&L (LP&L Br. 38–46) has argued the merits of certificate jurisdiction in its brief in this Court, maintaining that the "Green System" is purely intrastate and thus beyond the Commission's certificate jurisdiction under Section 7 of the Act, some response is necessary.

United witness J. H. Echterhoff testified in the district court below that a portion of the gas certificated for interstate commerce on United's "Black System" was injected into the "Green System" with the remainder of the stream continuing out of state (App. 179).[12] Echterhoff further testified that, if the interconnections between the Green and Black systems were closed off, the Green System would have an insufficient supply to meet the needs of customers on

[12] Similar testimony was offered by LP&L witness Belvin (App. 225–227).

that system, and that a "critical situation" would develop in the New Orleans area served by the Green System.[13]

The Commission in Opinion No. 610, while finding jurisdiction over the Green System and remanding the issue of certification to the examiner, also took steps to avoid such a critical situation from occurring in the New Orleans area by ordering United, on an interim emergency basis, to continue to deliver interstate gas to New Orleans customers served by the Green System (United Pet. App. 121a). LP&L seeks to terminate all such injections. If such a termination is to occur, however, it should come through a complete review of the record in the direct review proceedings now pending before the Fifth Circuit, wherein all customers dependent upon the Green System can be heard, and not in a collateral proceeding instituted by a single industrial customer.

[13] Upon consideration of the record in the certificate proceeding, the Commission concluded that: "Evidence of record shows that United's customers in this area have in the past received substantial quantities of interstate gas supplies during the 1970–71 heating season and, based on projections for the 1971–72 heating season and thereafter, will require more substantial quantities of interstate gas, approximately 67% of the peak-day requirements in the New Orleans District." (United Pet. App. 102a–121a.)

For the foregoing reasons and for the reasons stated in our main brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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APRIL 1972.

U.S. GOVERNMENT PRINTING OFFICE 19

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term 1971

MOTION FILED
APR 25 1972

Nos. 71-1016 and 71-1040

Federal Power Commission, *Petitioner*,

v.

Louisiana Power & Light Company, et al.,

Respondents.

United Gas Pipe Line Co., et al., *Petitioners*,

v.

Louisiana Power & Light Company, et al.,

Respondents.

MOTION FOR LEAVE TO SUPPLEMENT BRIEF FOR MOBILE GAS CORPORATION, ET AL., AMICI CURIAE, AFTER ORAL ARGUMENT

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April 25, 1972

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IN THE

Supreme Court of the United States

October Term 1971

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United Gas Pipe Line Co., et al., *Petitioners*,

v.

Louisiana Power & Light Co., et al., *Respondents*.

MOTION FOR LEAVE TO SUPPLEMENT BRIEF FOR MOBILE GAS CORPORATION, ET AL., AMICI CURIAE, AFTER ORAL ARGUMENT

Mobile Gas Service Corporation, et al.[1] ("Distributors"), gas utility customers of petitioner United Gas Pipe Line Company, who were permitted to file a brief amici curiae, hereby move for leave to file the attached supplement to that brief after oral argument, pursuant to Rule 41(5).[2] In support thereof they state as follows:

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[1] Mississippi Valley Gas Company and Clarke-Mobile Counties Gas District joined in the brief previously filed and join in this motion and the attached supplement.

[2] See *Watts v. Seward School Board*, 391 U.S. 902 (1968).

(1) These cases were orally argued April 19, 1972. On the same day the United States Court of Appeals for the District of Columbia Circuit announced its decision in *Monsanto Company v. Federal Power Commission*, D.C.Cir. Nos. 71-1306, 72-1093, and 72-1094.[3] Its opinion referred to the Fifth Circuit's holding, in the case[4] that is here under review by this Court, which said the FPC's curtailment proceeding (RP71-29) did not "oust" the district court of jurisdiction. (Slip Op. 15):

> . . . [O]ur decision diverges from both the Fifth Circuit's ruling, rooted in an approach that differed critically from that of the FPC, and the action of the District Court [in Nos. 72-1093 and 72-1094], rooted in an approach sustaining the authority of the FPC.

(2) Distributors' brief amici curiae argues that the Fifth Circuit erred in not yielding priority to FPC determination of both of the questions it undertook to decide as to the coverage of the Gas Act (pp. 12-19), and that neither question "should be reached by this Court in the present posture of this case" (p. 8). Because of the avowed divergence of the D.C. Circuit's holding from that of the Fifth Circuit, Distributors, amici, now urge that they should be allowed to supplement their brief to point out the relevance of the D.C. Circuit's decision to their contentions.

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[3] A certified copy of the opinion and judgment of the D.C. Circuit have been filed with the Clerk and copies are attached. The original pagination of the Slip Opinion has been preserved and is used herein.

[4] Cited FPC Br. 10 n. 10, 17, Monsanto Mo. April 3, 1972, 1-3.

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IN THE

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Federal Power Commission, *Petitioner*,

v.

Louisiana Power & Light Company, et al.,

Respondents,

United Gas Pipe Line Co., et al., *Petitioners*,

v.

Louisiana Power & Light Co., et al., *Respondents*.

On writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENT TO BRIEF FOR MOBILE GAS SERVICE CORPORATION, ET AL., AMICI CURIAE

1. Distributors' brief amici curiae argued (p. 9) that the court of appeals' refusal to yield priority to FPC determination of the FPC's jurisdiction under the Natural Gas Act (1) to curtail United's service obligations, and (2) to regulate transportation of gas on United's so-called "Green System" (as being "in interstate commerce") is in conflict with the controlling decisions, including the per curiam opinion in *FPC v. Arkansas P.&L. Co.*, 330 U.S. 802 (1942). They pointed out (a) that *Arkansas* held that *Myers v. Bethlehem Shipbuilding Corp.* applies to FPC determinations of the coverage of the acts it administers (p. 18), and (b) that *General American Tank Car*

Corporation v. Eldorado Terminal Co., 308 U.S. 422 (1940), makes plain that the exhaustion rule calls for the courts to stay their hands pending such Commission determinations (p. 17)—not that it is a "strange, Frankenstein legislative delegation that would . . . oust the adjudicatory power of a court. . . ." (FPC Pet. App. 27a).

The opinion of the D.C. Circuit on those questions, citing the *Myers* and *General Tank Car* decisions, respectively (Slip Op. 16, 17), firmly supports the arguments of the Distributors' brief amici curiae.

2. The Distributors' brief also argued that there can be no determination of the question of irreparable injury that the Fifth Circuit remanded to the district court until it has been determined whether the Commission has curtailment jurisdiction, and, if so, whether Louisiana P. & L. is being deprived of gas to which it is lawfully entitled (13 n. 13). They argued that this cannot be determined in the absence of the other customers who would necessarily be deprived of gas if direct industrial customers were to get their contract quantities (6 n. 3). And they argued that only a Commission determination can meet this need. Thus this case provides a sharp example of the basic necessity for exhaustion of administrative remedies in order to achieve uniformity, as originally spelled out by Mr. Justice White in *Texas Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

So, again, the D.C. Circuit's opinion strongly supports the argument of the Distributors' brief amici (Slip Op. 16):

> While the particular cases of the industrial consumers may have equity, the overall interest of the public—at least pending final determination—may also require consideration of the equities of others.

The Distributors' brief also argued that the participation of the FPC in the making of the record in the district court did not make the exhaustion rule inapplicable (15 n. 25). This becomes important by reason of the concession of counsel for respondent L.P.&L. (in response to questioning by Mr. Justice

White near the conclusion of counsel's oral argument), to the effect that such participation was the sole justification for not following the exhaustion rule. The concession is understandable in the light of the collapse of L.P.&L.'s attempts to support the refusal to follow the rule on other grounds. This is particularly true with respect to irreparable injury claimed to call for equitable relief (L.P.&L. Br. 44-45), which fell for the reasons referred to above. Moreover, there is FPC's dispositive answer to that claim that FPC's evidence was concededly received in the district court for the limited purpose of showing that the Commission had undertaken to decide the question that the district court was asked to decide (FPC Reply Br. 11).

Thus, the D.C. Circuit's decision corroborates that *Myers*, which was held applicable to FPC in *Arkansas*, is still indistinguishable, and controlling.

In the absence of any showing that retention of the case by the district court is appropriate in order to preserve L.P.&L.'s legal position, the decision of the D.C. Circuit fully supports the conclusion of the Distributors' brief amici curiae that the case should be dismissed, and the other questions that have been argued should not be reached by this Court.

Respectfully submitted.

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April 25, 1972

APPENDIX

Opinion and Judgment in *Monsanto Company v. Federal Power Commission*, D.C. Cir., Nos. 71-1306, 72-1093, 72-1094, decided April 19, 1972 (preserving the pagination of the Slip Opinion)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1336 September Term, 19 71.

Monsanto Company,

Petitioner

v.

Federal Power Commission,

Respondent

United Gas Pipe Line Company,

Intervenor

United States Court of Appeals
for the District of Columbia Circuit
FILED Apr 19 1972
Nathan J. Paulson
CLERK

Petition for Review of Order of the Federal Power Commission

Before: LEVENTHAL and ROBB, Circuit Judges, and [illegible],* U. S. Senior District Judge for the District of Columbia.

J U D G M E N T

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the petition to review order of the Federal Power Commission is hereby dismissed.

Per Curiam

For the Court:

Nathan J. Paulson
Clerk

Dated: April 19, 1972.
Opinion by Circuit Judge Leventhal.

*Sitting by designation pursuant to 28 U.S.C. § 294(c)(1970).

Opinion by Circuit Judge Leventhal.
*Sitting by designation pursuant to 28 U.S.C. § 294(c)(1970).

2.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1306

MONSANTO COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

UNITED GAS PIPE LINE COMPANY, INTERVENOR

No. 72-1093

MONSANTO COMPANY, A CORPORATION, APPELLANT

v.

UNITED GAS PIPE LINE COMPANY, A CORPORATION

FEDERAL POWER COMMISSION

TEXAS GAS TRANSMISSION CORPORATION

No. 72-1094

TEXAS GULF SULPHUR COMPANY, A CORPORATION, APPELLANT

v.

UNITED GAS PIPE LINE COMPANY, A CORPORATION

FEDERAL POWER COMMISSION

TEXAS GAS TRANSMISSION CORPORATION

1.

Petition for Review of Order of the Federal Power Commission and Appeals from the United States District Court for the District of Columbia

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Decided April 19, 1972

Mr. John T. Miller, Jr., with whom *Mr. James J. Bierbower* was on the brief, for petitioner in No. 71-1306 and appellants in Nos. 72-1093 and 72-1094.

Mr. George W. McHenry, Attorney, Federal Power Commission, of the bar of the Supreme Court of Tennessee, *pro hac vice*, by special leave of court, with whom *Messrs. Gordon Gooch*, General Counsel, *Leo E. Forquer*, Solicitor, *J. Richard Tiano*, First Assistant Solicitor, and *George P. Lewnes*, Assistant General Counsel, Federal Power Commission, were on the brief, for respondent in No. 71-1306 and intervenor-appellee Federal Power Commission in Nos. 72-1093 and 72-1094.

Mr. W. DeVier Pierson, with whom *Mr. Peter J. Levin* and *William B. Cassin* were on the brief, for appellee United Gas Pipe Line Company in Nos. 72-1093 and 72-1094 and intervenor in No. 71-1306.

Mr. Christopher T. Boland for intervenor-appellee Texas Gas Transmission Corporation in Nos. 72-1093 and 72-1094.

Before LEVENTHAL and ROBB, *Circuit Judges*, and MATTHEWS,* *U.S. Senior District Judge* for the District of Columbia.

LEVENTHAL, *Circuit Judge*: This court has before it consolidated appeals: A petition by Monsanto Company (No. 71-1306) to review an action of the Federal Power

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* Sitting by designation pursuant to 28 U.S.C. § 294(c) (1970).

Commission, and appeals by both Monsanto (No. 72-1093) and Texas Gulf Sulphur Company (No. 72-1094) from a judgment of the District Court dismissing their contract actions brought against United Gas Pipe Line Company, on the ground that the matter involved is within the jurisdiction not of the court but of the Commission, which had intervened in the civil actions.

I. BACKGROUND

A. *Underlying Facts*

What has precipitated these controversies is the current shortage of field natural gas supply. While the shortage is general[1] we focus particularly on the fact that while United, a "natural gas company" under the Natural Gas Act (Act)[2], operates an interstate natural gas transmission pipeline, it does not—at least as of the present and recent past—have a supply of natural gas sufficient to meet the requirements of its customers. Monsanto and Texas Gulf Sulphur are industrial customers of United, buying for use, and not for resale. United's direct sales to these industrial customers are not subject to rate regulation under the Act, but sales of gas in interstate commerce to direct sales customers purchasing for use are subject to certificate regulation under § 7 of the Act.

Monsanto buys natural gas from United under a long-term requirements contract, up to 65,000 Mcf per day, for use as both raw material and as boiler fuel in its Pensacola

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[1] See Southern Louisiana Area Rate Cases, 428 F.2d 407, 437 (5th Cir.) *cert. denied*, sub nom. Municipal Distributors Group v. FPC, 400 U.S. 950 (1970).

[2] The Natural Gas Act is codified at 15 U.S.C. § 717 *et seq.* The definition of natural gas company appears in § 1(b) of the Act, 15 U.S.C. § 717(a).

plant, alleged to be the largest unified nylon yarn plant in the world. The Commission issued an order pursuant to § 7(a) of the Act, authorizing United to deliver up to 75,000 Mcf of gas daily to Monsanto, upon a finding that this was necessary and appropriate under the Act and required by the public convenience and necessity.[3] In the parlance of the industry, Monsanto has a "firm" contract rather than one of the "interruptible" contracts which essentially provide that the pipeline company may terminate delivery on short notice. The electric utility or other buyer in such interruptible contracts usually pays a lower price but is under the obvious necessity of installing alternative arrangements, permitting a ready conversion to say, residual fuel oil, as a source of boiler fuel. However, Article IX of the Monsanto-United contract,[4] like United's contracts with other direct industrial customers, makes certain provision for curtailment of supply in time of gas shortage, and an underlying controversy is whether United's actions are in accord with its contract obligations.

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[3] United Gas Pipe Line Co., 34 FPC 892 (1965). This amended an earlier order authorizing delivery of up to 56,000 Mcf per day to the plant. United Gas Pipe Line Co., 24 FPC 216 (1960).

[4] Article IX of the contract provides:

> Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic customers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other contract consumers, including Buyer.

Copies of United's contracts with its industrial customers are filed with the Commission pursuant to its regulations.[5]

B. *Federal Power Commission Curtailment Proceeding*

On October 26, 1970, United filed with the Commission a petition for declaratory order, concerning its curtailment program, described in the petition, to be initiated November 1, 1970, stating in substance: Because of the national gas shortage United will be obliged to curtail deliveries during the 1970-71 winter season, and to implement section 12 of its filed Tariff on curtailment of deliveries. Most customers have been understanding and cooperative, recognizing the shortage is national in scope and not a matter subject to United's control, that United's program is the most equitable under the circumstances, and also the program United is obliged to implement under the tariff provision and like provisions contained in all United's direct sales contracts. However, certain customers have expressed objections, which United deems without merit, "but the possible gravity of leaving these disputes unresolved has forced United to request that the Commission declare the curtailment plan described herein to be in keeping with the provisions of its filed tariff."

The final section of the petition went beyond the tariff (at least if that is taken to govern sales subject to rate

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[5] Section 155.1 of the Regulations under the Natural Gas Act, 18 C.F.R., subchapter E, Part 155. See also Part 157. In United Gas Pipe Line Co. v. FPC, 86 U.S.App.D.C. 314, 181 F.2d 796 (1950), the court held that since the FPC's regulation, Order No. 144, requiring that rates be filed in tariff-schedule form, instead of as amendments to contracts as previously, had not been preceded by a quasi-judicial proceeding at which evidence was presented, the court of appeals was without jurisdiction to entertain a petition for review under § 19(b) of the Act.

regulation to reach industrial users). It recited that the orderly implementation of United's curtailment program "obviously requires the cooperation, voluntary or otherwise, of United's direct industrial customers." However, some customers say they do not intend to cooperate, and are not required to do so, under their contracts. United asked that the Commission's order also declare that its curtailment program "is in accordance with the provisions of its contracts for the sale of gas in interstate commerce with direct sales customers." United anticipated curtailment of deliveries only to customers in the industrial category.[6]

This petition of United was made the subject of FPC Docket No. RP71-29. The Commission gave public notice, and Monsanto timely intervened in opposition to the proposed curtailment program. It relied on its contract rights, challenged the claim that the curtailment program was equitable, and asserted, *inter alia*, that United's shortage, if any, may be due to its attachment of additional service obligations interfering with its obligation to serve its older, firm customers. On December 10, the Commission set the matter for public hearing on December 21, stating that the hearing was to resolve the question, *inter alia*, of whether it would constitute undue discrimination if

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[6] Section 12 of United's tariff establishes service priorities as follows: (1) gas used for industrial purposes; (2) gas burned to generate electricity used by domestic customers; (3) gas used by domestic consumers. In event of shortage, United curtailment would first be on a ratable basis in category (1); if all such deliveries had to be discontinued and a shortage still existed, curtailment would be ratably within (2), etc. Within category (1) United's petition proposed ratable reduction regardless of whether the gas was sold to industries by United, or by its pipeline customers, or by its city-gate customers, or was sold for the generation of electricity for industrial consumption.

United's curtailment program "did not apply equally to the jurisdictional and direct sales customers of United." The order pointed out that United had already placed its curtailment plan in effect and prompt hearings were necessary, and specified that United would present its entire case orally, followed by immediate cross-examination of United's witnesses.

At the hearing, before witnesses were presented, a recess was suggested to attempt to devise for the current winter a curtailment program satisfactory to all. After United put in its direct case orally, United's counsel read into the record an interim curtailment arrangement to which all of the parties ultimately agreed, with the exception of Monsanto. Essentially the arrangement was to accept United's plan, with these modifications—that United would attempt to purchase up to 300,000 Mcfd on an emergency basis from non-jurisdictional sellers,[7] and that the customers would not seek injunctive relief or damages for any gas curtailments made prior to March 31, 1971.

The Examiner stated he would certify the proposal to the Commission for its consideration and recessed the hearing to resume January 12, 1971. On December 29, 1970, the Commission issued an order providing: "The interim compromise settlement as reflected in the record of December 22, 1970, is approved." Monsanto's petition to review, filed April 26, 1971, attacks that order, and also the order of February 26, 1971, denying Monsanto's application

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[7] FPC's Order No. 418, Dec. 18, 1970, Docket R-404, 35 Fed. Reg. 19173 (1970) provides that in such emergency conditions non-jurisdiction field producers can sell to an interstate pipeline for up to a 60-day period, without thereby becoming subject to the jurisdiction of the FPC.

Monsanto contends this modification added nothing to United's prior duty to seek out all available supplies, and therefore the settlement agreement was only a one-sided surrender of contract rights of users.

for rehearing. The Commission's motion to dismiss the petition for review or, alternatively, for summary affirmance, was denied by our order dated June 23, 1971.

C. *Action In District Court*

Actions against United were filed in the U.S. District Court for the District of Columbia by Monsanto, October 8 1971, and a month later by Texas Gulf Sulphur Company, also a direct sale industrial customer.

Allegations of complaints

Plaintiffs brought these as contract actions, seeking damages and injunctive relief. They claimed their contract rights were impaired as to the past by United's curtailment program, put into effect November 1, 1970, both prior and subsequent to the FPC's approval of the settlement agreement.

They sought injunctive relief against future breaches of contract rights.

Plaintiffs' claims on the merits—which are only contentions, for there has been no proof—run in substance as follows:

The continued supply of United's gas service under their firm contracts is vital to plaintiffs.[8] While the contracts

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[8] The pertinent allegations are these: Monsanto needs the gas at its Pensacola plant, both as raw material, and for energy, the cost of which is a critical item in an industry exposed to competition from both domestic and international sources. The plant began operations in 1953, and the FPC authorized the service (see note 3). While curtailments thus far have not interfered with the supply of gas (about 15%) purchased for process purposes, Monsanto's need to switch to oil supplies for fuel have increased fuel costs substantially ($476,000 for Nov. 1970-September 19, 1971), jeopardized its competitive position, and damaged Pensacola's economic

contain a force majeure curtailment provision, and a similar provision was inserted by United into its Tariff, for the case of "shortage of gas," this is inapplicable to excuse United's actions as consistent with the contracts because the so-called "shortage of gas" on United's system is due to "improvident attachment by United of additional markets." When pipeline companies undertake, as they have, to sell gas from general systems reserves to industrial customers contracting for a full-requirements firm gas supply, and making large investments in reliance thereon, the pipeline company is under the obligation of a fiduciary principle.[9] Plaintiffs contend that an analysis of United's activities since 1968, in the light of its in-house supply-demand studies, show that United deliberately and prematurely exhausted the gas supplies it should have been husbanding to carry out its firm supply obligations, that it filed annual reports (on FPC Form 10) which de-

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stability due to reduction in number of employees at the plant.

Texas Gulf designed its Bully Camp Frasch Process Sulphur Mine entirely around the firm supply of natural gas, up to 10,100 Mcf per day, called for by its 20-year firm contract executed in 1967 with United. The mine is in Louisiana bayou country, accessible only by boats. Its process requires continuous large volumes of super-heated water injected into sulphur-bearing strata far below the surface. It was engineered for gas and cannot feasibly be converted to other fuels. At least 1500 Mcf per day is necessary to avoid destruction of the wells, and 7000 Mcf per day is needed for economic feasibility in operating the mine. Shutdown for economic reasons risks both the $10 million investment in the mine, because the facilities cannot practicably be salvaged, and the loss of the sulphur remaining in the underground formation, since it would not be economically feasible to reopen the mine.

[9] Appellants rely, *e.g.*, on H. R. Williams, *The Fiduciary Principle in the Law of Oil and Gas*, 13th Oil & Gas Institute 201, 274 (S.W. Legal Fdn. 1962).

ceived the FPC and public as well as United's customers, that at a time when it knew it was short of gas it filed new certificate applications, like its May 1970 application to sell to Mississippi River Transmission Corp., which resulted in new delivery of 51,721 Mcf per day beginning November 3, 1970, the day it began to curtail firm service on a continuous basis. Furthermore, United gave notice in 1971 that it would continue to enlarge its daily deliveries during 1971-1972—50,000 Mcf on direct industrial sales, and 200,000 Mcf on city gate deliveries—at the expense of the firm service it was already obligated to maintain.

Plaintiffs asked the court to compensate it for damages already sustained, to enjoin United from this threatened activity disabling it from meeting its contract obligations, and to require United to interrupt service commenced by United since the fall of 1968 with knowledge that its gas supplies did not permit this additional service without curtailing existing firm service.

Motions to Dismiss Actions As
A Collateral Attack on FPC Proceedings

Motions to dismiss these actions were filed by United, and by the FPC and Texas Gas Transmission Corp. (which would be affected if United's "new" service were cut back) as intervenors. These motions asserted that the court was without jurisdiction of the controversy, which was a matter for the FPC, subject to review only in the courts of appeals, and that the actions were impermissible both as a collateral attack on the FPC's jurisdiction, and for failure to exhaust prescribed remedies before the FPC and the court of appeals.

These motions brought before the District Court the fact that in 1970 the FPC established a curtailment docket on United's application, FPC Docket No. RP 71-29, and

the sequence therein of the interim settlement; the FPC's approval of December 29, 1970; Monsanto's petition to this court; and the FPC's issuance of opinion No. 606 on October 5, 1971, following the close of the evidentiary record and waiver of Hearing Examiner's decision. The FPC held therein that it had "plenary authority to allocate the gas supply of jurisdictional pipelines to all customers, including direct industrial users, regardless of any contracts with individual customers, direct or resale." By Opinion 606-A, December 3, 1971, the FPC denied rehearing and request for modification. We are informed that Opinion No. 606 is pending on review in the Fifth Circuit.[10]

District Court's Dismissal

On January 4, 1972, the District Court orally announced its view that the matter "is within the jurisdiction of the Federal Power Commission rather than the jurisdiction of this court," that the Commission is authorized to regulate the transportation of gas in interstate commerce, and other just and reasonable practices and services of natural gas line companies. The order of dismissal was entered January 21, 1972.

D. *Subsequent Developments—Before FPC*

We shall discuss under III the subsequent developments of a decision of the Fifth Circuit, issued January 14, 1972, and the granting of certiorari. Here we note merely that on January 15, 1972, appellant Texas Gulf Sulphur filed a petition with FPC for emergency relief—as permitted by FPC Opinion No. 606. It sought an order directing United to deliver 7,000 Mcf per day, and no less than 1,500 Mcf, pending a final order in the curtailment pro-

[10] Louisiana Power & Light Co. et al. v. FPC, Fifth Cir. No. 71-3429, and other cases consolidated therewith.

ceedings. This was granted in part by order of January 28, 1972, ordering United to deliver no less than 1,500 Mcf daily, in view of probable irreparable damage to plant facilities and the risk of loss of sulphur reserves. The FPC declined to order the 7,000 Mcf per day, sought on the ground that at lesser volumes the mine would be uneconomic to operate, on the ground that loss of revenues or profits is not the type of injury warranting extraordinary relief.

II. DISMISSAL OF MONSANTO'S PETITION TO REVIEW

We dismiss Monsanto's petition to review the FPC's action of December 29, 1970, approving the "interim settlement in the curtailment proceedings, without decision on the merits, for lack of aggrievement.

Monsanto's petition to review was bottomed on the hypothesis that the FPC's action would operate—unless contested—to affect Monsanto's legal rights, its rights against United in a contract action, and perhaps legal position in the final curtailment proceedings. On oral argument, Commission counsel represented that the FPC order had no legal effect other than to indicate that the FPC accepted the agreement of the parties. It was a kind of psycho-legal action, to induce maximum agreement and adherence. It was not intended as, and may not operate as, a preclusion or modification of the rights of Monsanto, which was not a party to the agreement.

The FPC's action is certainly not clear, and it is easy to understand why Monsanto appealed and why we declined to grant the FPC's pre-argument motion to dismiss. However, we are now satisfied that the submission of Commission counsel is a reasonable view of its action, we adopt it, it is now binding on the Commission, and that leaves no significant reason for maintenance of the appeal. Alton & Southern Ry. v. Int'l Ass'n of Machinists

& A.W. —— U.S.App.D.C. ——, —— F.2d (No. 24,217, April 11, 1972); Consumers Union v. Veterans Adminis., 436 F.2d 1363 (2d Cir. 1971). This action presents no cause for concern to Monsanto, whose counsel candidly stated, at argument, that he thought the case was moot, and hoped it was moot, but had filed a protective appeal to preserve Monsanto's position. This was entirely prudent, and since the FPC action was far from clear as to its limited consequence, our action dismissing this appeal will be without recovery of costs, each party to bear its own costs as already incurred.

III. REMAND TO DISTRICT COURT DOCKET OF CONTRACT ACTIONS AGAINST UNITED

In the other two appeals, we find that protection of the possible rights of appellants requires reversal of the District Court's judgment and remand of the actions to its docket.

Fifth Circuit Decision

We preface our analysis with a reference to Louisiana Power & Light Co., et al. v. United Gas Pipe Line Company, et al., —— F.2d —— (5th Cir. No. 71-2550, Jan 15, 1972), *cert. granted,* with provisions for expedited consideration, sub nom., Federal Power Commission v. Louisiana Power & Light Co., —— U.S. —— (March 6, 1972).

The Fifth Circuit's ruling came in an action begun by Louisiana Power & Light (LP&L) in district court in March 1971, while the United curtailment proceeding was pending before the FPC, seeking an injunction ordering United to deliver to LP&L the full amount provided for by LP&L's contract with United. The district court dismissed the action on the ground that the FPC has exclusive juris-

diction over United's curtailment program.[11] The Fifth Circuit reversed, holding that the FPC is without jurisdiction to order curtailment of gas deliveries to direct sales industrial customers, that it has jurisdiction under § 7 of the Act to grant initial certificates of public convenience and necessity for such direct sales, and to authorize an abandonment of such sales, but that Congress has not granted it continuing jurisdiction to modify or condition a certificate issued for facilities used to make a direct sale. It further held that the FPC's curtailment proceedings did not oust the district court of jurisdiction, and remanded with directions to the district court to expedite the disposition of the case on the merits.

In its petition for certiorari urging expedited review of the decision the FPC stressed that it had been deprived of jurisdiction to allocate gas transported by interstate pipelines among all consumers in a fair and equitable manner when gas shortages make full deliveries to all customers impossible. It submitted that the FPC has such jurisdiction over curtailments by interstate pipelines of natural gas deliveries to direct sales customers, and that while § 1(b) restricts jurisdiction over sales to sales for

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[11] The court also dismissed LP&L's claim that the FPC lacked jurisdiction to issue a certificate of public convenience and necessity covering United's pipeline facilities used to make deliveries to one of its plants. A similar problem may arise with respect to Texas Gulf Sulphur, in view of the February 9, 1972, decision of the FPC in United Gas Pipe Line Co., FPC Docket No. CP 71-89, finding that a part of United's system, which had previously been regarded purely intrastate, had become jurisdictional by virtue of United's commingling of interstate gas within the system. The issue whether a certificate should issue authorizing the continuation of service to Texas Gulf Sulphur, *inter alia*, has been remanded to the Hearing Examiner.

We see no occasion to comment at this time on this certificate phase of FPC proceedings relating to United.

resale, the Act applies without limitation to all transportation of gas in interstate commerce. The petition relied, *inter alia,* on Panhandle Eastern Pipe Line Co. v. Pub. Serv. Commn. of Indiana, 332 U.S. 507, 523 (1947); FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 28 (1961); and the provision in § 4(b) providing that no natural gas company shall, with respect to any transportation or sale subject to FPC jurisdiction, make any undue preference.

Reasons for Remanding to District Court Docket

While appreciation of the procedural context of this controversy has led to an opinion of perhaps excessive length, we think that the principles pertinent to our present action may be briefly stated and applied.

1. First, we conclude that the District Court should not have undertaken to make a decision one way or the other concerning the FPC's jurisdiction in the curtailment proceedings. In this respect, our decision diverges from both the Fifth Circuit's ruling, rooted in an approach that differed critically from that of the FPC, and the action of the District Court, rooted in an approach sustaining the authority of the FPC.

The authorities in this area of the law are by no means easy to reconcile. A statement of appropriate principle probably can do little more than indicate the factors that must be weighed. K. DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 20.01-20.03.

The principal factor underlying our approach is our awareness that there is a great deal of merit to the FPC's claim of curtailment jurisdiction. In a case like this, where the parties may show irreparable injury in the event the agency proves to lack jurisdiction, a rough

forecast as to jurisdiction, without decision, is a reasonable guide to the court's action. This is not unlike the rule that an equity court, in balancing the considerations on a request for preliminary injunction, often, and perhaps typically, must rest on a reflective, though preliminary, appraisal of the merits.[12]

2. It is of course no bar to the decision to await the agency ruling that it will be a ruling on its own jurisdiction. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). This was, indeed, recognized by the Fifth Circuit in J. M. Huber Corp. v. Denman, 367 F.2d 104 (1966).

3. It counts against the complete abstention of the court that meanwhile the plaintiffs may be subject to irreparable injury. There are, however, offsetting and inter-related considerations. There is need to take into account possibility of irreparable damage to the public, if relief is wrongfully granted the complaining individual. Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 552 (1937). While the particular cases of the industrial consumers may have equity, the overall interest of the public—at least pending final determination—may also require consideration of the equities of others. Finally, there is the possibility, under Opinion 606 as issued, of administrative relief for exceptional cases, such as was granted in part to Texas Gulf Sulphur on January 28, 1972. Compare Permian Basin Rate Cases, 390 U.S. 747, 771 et seq. (1968).

4. The court may retain jurisdiction of an action even while the agency is deciding whether and to what extent

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[12] Delaware & Hudson Ry. Co. v. United Transportation Union, 450 F.2d 603, 619 (D.C. Cir. 1971); Mass. Ave. Heights Citizen Assn., v. Embassy Corp., 139 U.S.App.D.C. 355, 356, 433 F.2d 513, 514 (1970).

it has jurisdiction, and may grant temporary relief, while the agency is completing its consideration, in appropriate cases. For analogy, reference may be made to rulings under the supple doctrine of primary jurisdiction.[13]

5. Even where the case is more likely one of exhaustion of remedies, predicated on an assumption of agency jurisdiction, rather than primary jurisdiction, in which a court obtains the benefit of a consideration of a specialized agency that is only "advisory," there is sound doctrine for retention of the case on the docket. When the court perceives that there is no action whatever cognizable in court, it properly dismisses the action altogether.[14] But even when a case must await an inquiry that is within the jurisdiction and peculiar competence of the agency, it is properly held by the court pending the conclusion of the administrative proceeding when that is appropriate in order to preserve the legal position of the private party. General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433 (1940).

The propriety of this course is fortified, for the case at bar, by the consideration that even assuming the FPC's curtailment jurisdiction is upheld, along the lines developed in its Opinion No. 606, it does not automatically follow that plaintiffs are lacking a contract remedy in damages. It is possible that the FPC may be held to have jurisdiction under § 4(b), to prohibit unreasonable preferences in transportation, without relieving the pipeline

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[13] Wheelabrator Corp. v. Chafee, —— U.S.App.D.C. ——, —— F.2d ——, (No. 24,705, Oct. 14, 1971); Brawner Building, Inc. v. Shehyn, 143 U.S.App.D.C. 125, 133-35, 442 F.2d 847, 855-57 (1971).

[14] Montana-Dakota Utility Co. v. Northwestern Public Serv. Co., 341 U.S. 246 (1951).

company of liability for damages. That is to say, the industrial user may be able to say: Given the pickle created by the pipeline company, what the FPC did was lawful and proper as to actual subsequent rationing of the limited supply of gas, but the pipeline company is liable in damages because of the way it put us all in the pickle. And in the case at bar, there is a claim for damages sustained before the FPC issued an order. We do not decide this question, but only identify the problem. Certainly the problem is one that requires attentive consideration.

In No. 71-1306, the petition to review is dismissed. In No. 72-1093, 72-1094, the judgment of the District Court is vacated, and the cases remanded to the District Court, to remain on its docket, for further proceedings not inconsistent with the opinion of this court.

So ordered.